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Supreme Court, U.S.
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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

IN RE: IONOSPHERE CLUBS, INC. and EASTERN AIRLINES, INC.,
Debtors.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AFL-CIO,
Petitioner,
v.

MARTIN R. SHUGRUE, JR., as Chapter 11 Trustee for EASTERN AIR LINES, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a bankruptcy court can enjoin and fully adjudicate the merits of a district court lawsuit alleging that a carrier has violated a collective bargaining agreement and the Railway Labor Act where that collective bargaining agreement has not been modified or rejected pursuant to Bankruptcy Code Section 1113?

2. Whether a lawsuit alleging that a carrier has violated a collective bargaining agreement and the Railway Labor Act—a lawsuit which could exist independently of a bankruptcy case—is a "core" proceeding in which a bankruptcy court can issue a final order or judgment pursuant to 28 U.S.C. § 157(b)?

3. Whether a bankruptcy court can enjoin and fully adjudicate the merits of a district court lawsuit alleging that a carrier has violated a collective bargaining agreement and the Railway Labor Act where resolution of the lawsuit requires consideration of laws of the United States other than title 11 regulating organizations or activities affecting interstate commerce, and where the lawsuit would be subject to mandatory withdrawal to the district court pursuant to 28 U.S.C. § 157(d) had it originally been brought in the bankruptcy court?

LIST OF PARTIES TO THE PROCEEDINGS

The Air Line Pilots Association, International, AFL-CIO was the defendant in the bankruptcy court, appellant in the district court, appellee in the court of appeals and is petitioner in this Court.

Eastern Air Lines, Inc. was the plaintiff in the bankruptcy court and the appellee in the district court. Martin R. Shugrue, Jr., as Chapter 11 Trustee for Eastern Air Lines, Inc., was the appellant in the court of appeals and is the respondent in this Court.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

The Air Line Pilots Association, International, AFL-CIO petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the judgment in *In re Ionosphere Clubs, Inc.*, 922 F.2d 984 (2d Cir. 1990).

OPINIONS BELOW

The opinion of the court of appeals is reported at 922 F.2d 984 (2d Cir. 1990), and is reproduced at App. A.[1] The mandate of the court of appeals is reproduced at

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[1] ("App. ——") refers to the appendix annexed to this petition. ("J.A. ——") refers to the Joint Appendix on appeal.

App. B. The opinion of the district court is reported at 114 Bankr. 379 (S.D.N.Y. 1990), and is reproduced at App. C. The findings of fact and conclusions of law of the bankruptcy court are reported at 105 Bankr. 773 (Bankr. S.D.N.Y. 1989), and are reproduced at App. D. The order of the bankruptcy court is reproduced App. E.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1990. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved in the case are relevant portions of the Bankruptcy Code, 11 U.S.C. §§ 105, 362, 1113; the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"), 28 U.S.C. §§ 157(b), (d), 1334; and the Railway Labor Act ("RLA"), 45 U.S.C. §§ 152, 156. The pertinent text of these statutes is set forth in App. F.

STATEMENT OF THE CASE

The underlying dispute at issue in this case arises out of the decision of Eastern Air Lines, Inc. ("Eastern") to lease aircraft from its corporate affiliate Continental Airlines, Inc. ("Continental") and to crew the aircraft with Continental pilots rather than pilots on the Eastern System Seniority List.[2] Because the wet-leasing violated the collective bargaining agreement between Eastern and the Air Line Pilots Association, International ("ALPA"), ALPA filed a lawsuit in the United States District Court for the Southern District of Florida seeking to enjoin the leasing arrangement and/or to compel Eastern to sub-

[2] In the airline industry, this practice is referred to as a "wet-lease." Under a "wet-lease," one carrier leases aircraft and crews from another company for the purpose of performing the carrier's flying. App. A, 89a. Prior to 1989, Eastern had never wet-leased from another carrier. App. D, 89a.

mit to expedited arbitration. Eastern then commenced an action in the United States Bankruptcy Court for the Southern District of New York, where its Chapter 11 bankruptcy case was pending, and filed a motion for a preliminary injunction to enjoin ALPA's lawsuit. Despite Eastern's failure to comply with the exclusive provisions of Bankruptcy Code Section 1113, 11 U.S.C. § 1113, governing the modification of collective bargaining agreements, the bankruptcy court ordered ALPA to dismiss its lawsuit as a violation of the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362(a)(3), and enjoined the lawsuit pursuant to Bankruptcy Code Section 105, 11 U.S.C. § 105.

The Facts

At all times relevant to this dispute, ALPA and Eastern were bound by a collective bargaining agreement (the "Agreement") entered into pursuant to the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.* App. A, 3a. The "scope" clause found in Section 1 of the Agreement provides that Eastern is obligated to crew all aircraft used in or for the service of Eastern with pilots whose names appear on the Eastern System Seniority List, and it expressly prohibits wet-leasing. App. A, 23a-24a.

On March 4, 1989, Eastern's aircraft mechanics and ground service personnel represented by the International Association of Machinists ("IAM") commenced a primary strike against Eastern. App. C, 35a. That same day, ALPA decided that its members should engage in a lawful sympathy strike in support of Eastern's machinists. *See Eastern Air Lines, Inc.* v. *Air Line Pilots Ass'n, Int'l*, 710 F. Supp. 1342 (S.D. Fla.), *aff'd*, No. 89-5229 (11th Cir. June 7, 1989).[3]

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[3] At the commencement of ALPA's sympathy strike, Eastern filed a complaint in the United States District Court for the Southern District of Florida seeking judicial approval to alter certain terms contained in the Agreement pursuant to *Brotherhood of Ry. Clerks*

On March 9, 1989, Eastern filed a petition in the United States Bankruptcy Court for the Southern District of New York pursuant to Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101 *et seq.* App. A, 4a. Eastern filed a motion in the bankruptcy court on June 21, 1989 to reject the Agreement pursuant to Bankruptcy Code Section 1113. On July 26, 1989 Eastern withdrew its section 1113 motion before the court considered it. App. A, 4a.

Immediately thereafter, Eastern wet-leased aircraft and crews from Continental to be used to operate a portion of Eastern's regularly scheduled service. App. A, 5a-6a. Eastern apparently commenced only limited wet-leasing in August 1989. In late August, however, Eastern announced its plans to greatly increase its wet-leasing to include at least 16 aircraft and hundreds of Continental pilots for the duration of 1989 and the indefinite future. J.A. 596. ALPA commenced a lawsuit in the United States District Court for the Southern District of Florida [4] seeking damages and an injunction

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v. *Florida East Coast Ry.*, 384 U.S. 238 (1966). App. C, 39a. In *Florida East Coast*, this Court held that a carrier faced with a primary strike may "depart from the terms and conditions of the collective bargaining agreement," *id.* at 246, under extremely limited circumstances where the carrier can demonstrate that such changes are "truly necessary" to allow the carrier to continue operations. *Id.* at 248. In its complaint, Eastern sought a declaratory judgment that would have allowed Eastern to expand the number of hours that pilots would be permitted to fly. App. C, 39a. Eastern did not seek any judicial relief to permit wet-leasing. *See* J.A. 562-574. Eastern never pursued its *Florida East Coast* action, and it was dismissed *sua sponte* on July 17, 1989. App. C, 39a.

[4] The United States District Court for the Southern District of Florida, the site of Eastern's headquarters, has been the forum for a multitude of *debto.*-initiated litigation against ALPA both pre-petition and post-petition. *See, e.g., Eastern Air Lines, Inc.* v. *Air Line Pilots Ass'n, Int'l*, 670 F.Supp. 947 (S.D. Fla.), *aff'd*, 861 F.2d 1546 (11th Cir. 1988); *Eastern Air Lines, supra*, 710 F.Supp. 1342; *Eastern Air Lines, Inc.* v. *Air Line Pilots Ass'n, Int'l*, 744 F.Supp. 1140 (S.D. Fla.), *aff'd*, 920 F.2d 722 (11th Cir. 1990).

against the wet-leasing arrangement as an abrogation of the parties' Agreement and a violation of Eastern's obligations under the RLA or, in the alternative, an injunction pending expedited arbitration.[5] App. C, 40a-41a.

On September 25, 1989, Eastern filed a complaint and motions for a temporary restraining order and preliminary injunction in the United States Bankruptcy Court for the Southern District of New York to enjoin ALPA's lawsuit as burdensome to the Chapter 11 estate and as a violation of the automatic stay. 11 U.S.C. § 362. App. C, 41a. In the alternative, Eastern sought an injunction pursuant to section 105 of the Bankruptcy Code, 11 U.S.C. § 105. *See id.*

Proceedings Below

i. *Bankruptcy Court*

The bankruptcy court ordered ALPA to dismiss the wet-lease lawsuit as a violation of the automatic stay under Code Section 362(a)(3), and enjoined ALPA from prosecuting the wet-lease lawsuit pursuant to Code Section 105. App. D, 101a-102a.

The bankruptcy court held, without explanation, that Eastern's complaint constituted a core proceeding and that the bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and (2). App. D, 94a. The bankruptcy court stated that the purpose of the protection provided by Chapter 11 "is to give the debtor a breathing spell, an opportunity to rehabilitate its business and to enable the debtor to generate revenue." App. D, 95a. The bankruptcy court then concluded that ALPA's lawsuit was filed in violation of the automatic stay provisions of the Bankruptcy Code because the lawsuit "impedes Eastern's reorganization efforts and obstructs East-

[5] ALPA's complaint raises only issues of federal labor law arising under the RLA. The complaint does not allege any cause of action under the Bankruptcy Code. J.A. 431-440.

ern in its rebuilding efforts by controlling the manner in which it uses its assets." App. D, 100a.[6] The bankruptcy court ordered ALPA to dismiss the wet-lease lawsuit. The bankruptcy court reached this conclusion without directly addressing ALPA's claim that section 1113 of the Bankruptcy Code modified the automatic stay provisions of the Code as applied to actions against a debtor to enforce a collective bargaining agreement. *See* App. C, 42a.[7]

ii. *District Court*

ALPA appealed the bankruptcy court's decision to the United States District Court for the Southern District of New York. The district court consolidated the wet-lease appeal with another appeal by ALPA arising out of a dispute concerning the labor protective provisions ("LPPs") contained in the Agreement. App. A, 30a-31a.[8]

The district court reversed both the Bankruptcy Court's wet-lease and LPP decisions. The district court held that section 1113 prohibits the application of the automatic stay to any proceeding brought by a union to enforce a collective bargaining agreement against a debtor unless

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[6] The bankruptcy court also ruled that it had authority under section 105 to enjoin any action which could potentially interfere with the rehabilitation process. App. D, 97a-98a.

[7] Although Eastern did not request the bankruptcy court to determine the underlying merits of the wet-lease action, J.A. 419-426, the bankruptcy court, without any notice, discovery or briefing, reached the merits and ruled in Eastern's favor. *See* App. D, 101a-102a.

[8] In the LPP dispute, ALPA contended that Eastern had unified, consolidated, merged or pooled certain of its operations, services and/or facilities with Continental and, therefore, Eastern was required to make arrangements for the integration of the Eastern and Continental pilot seniority lists according to the Agreement. When Eastern refused to discuss the issue, ALPA sought bankruptcy court approval to arbitrate the LPP dispute. App. C, 36a-37a. The bankruptcy court denied ALPA's motion, concluding that the requested arbitration would violate the automatic stay provisions of the Code. App. C, 37a-39a.

and until the debtor complies with the provisions of section 1113 of the Code. App. C, 85a.[9] The district court agreed with the bankruptcy court that the automatic stay contained in section 362 is intended to provide a "breathing spell." App. C, 49a (citation omitted). The district court concluded, however, that the enactment of section 1113 rendered the automatic stay inapplicable to actions brought to enforce rights and obligations contained in a collective bargaining agreement:

> Judicial construction of the automatic stay, post-*Bildisco* and post-section 1113, so as to disable workers from commencing or continuing suits or proceedings against the debtor-in-possession arising under collective bargaining agreements (suspending all such actions temporarily and in some cases, indefinitely), would debilitate the recognized Congressional purpose of making collective bargaining agreements enforceable against debtors until and "unless the court approves the application for rejection pursuant to section 1113(c) or grants interim relief under section 1113(e)." 5 *Collier on Bankruptcy*, § 1113.01 at 1113-11 (15th ed. 1989).

App. C, 63a.[10]

iii. *Court of Appeals*

The Second Circuit unanimously affirmed the district court's decision with respect to the LPP dispute. A divided panel, however, reversed and remanded the por-

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[9] The court also held that, because equitable powers under section 105 can be used only in a manner consistent with the provisions of the Bankruptcy Code, the bankruptcy court could not provide relief pursuant to section 105 that, pursuant to the terms of section 1113, is only available to debtors who have satisfied the requirements of section 1113. App. C, 76a-83a.

[10] The district court noted that the application of the stay by the bankruptcy court may have mooted ALPA's request for injunctive relief, as opposed to damages, because of the apparent termination of the wet-leasing. App. C, 75a. The question of damages remains a live controversy despite Eastern's termination of wet-leasing and recent termination of operations.

tion of the district court's decision which related to the wet-lease dispute. The court of appeals first noted that in enacting section 1113, Congress intended that "a collective bargaining agreement remains in effect and that the collective bargaining agreement process continue[s] after the filing of a bankruptcy petition unless and until the debtor complies with the provisions of § 1113." App. A, 11a (citation omitted). The majority determined, however, that it was "preferable" to balance the purpose of section 1113 against certain stated purposes of section 362 on a case-by-case basis. App. A, 13a-14a.

The majority concluded that Code Section 362 has two distinct purposes: (1) to provide the debtor with a "breathing spell" from its creditors; and (2) "to centralize" disputes in the bankruptcy court so that the reorganization can proceed "efficiently, unimpeded by uncoordinated proceedings in other arenas," App. A, 8a, and so that the bankruptcy court can rule on the appropriate "manner and forum" in which disputes should be resolved. App. A, 13a. The court of appeals recognized that the first purpose could "not be reconciled with § 1113" and accordingly, stated "[w]ere that the only purpose of the automatic stay, we would be inclined to affirm the district court's thorough opinion in its entirety." App. A, 13a. In light of the second stated purpose of the automatic stay, the court of appeals concluded, however, that it could not adopt a "bright line rule precluding the application of the automatic stay to any situation involving a collective bargaining agreement." *Id.* Instead, the court of appeals held that "a case by case adjudication" is "preferable." App. A, 13a-14a. The court of appeals concluded that "application of the automatic stay provisions of § 362 of the Bankruptcy Code is precluded by § 1113(f) only to the extent that they permit a debtor unilaterally to terminate or alter a collective bargaining agreement." App. A, 22a.

With respect to the LPP dispute, the court of appeals found that the application of the automatic stay would allow Eastern to avoid its contractual obligation to arbitrate the dispute. Thus, it affirmed that portion of the district court's decision. App. A, 16a. With respect to the wet-lease dispute, the court of appeals determined that the application of the automatic stay would not allow Eastern to avoid its contractual obligations.[11] The court of appeals reasoned that "application of § 362 to a non-bankruptcy judicial proceeding only forecloses enforcement of the collective bargaining agreement if it cannot be enforced in the bankruptcy court." App. A, 17a. The court of appeals held that unless there was a jurisdictional limitation on the bankruptcy court's ability to hear and decide the wet-lease dispute, the application of the automatic stay to ALPA's lawsuit would not conflict with section 1113. App. A, 18a. Relying upon its decision in *In re Ben Cooper*, 896 F.2d 1394 (2d Cir.), *vacated*, 111 S. Ct. 425 (1990), the court concluded that the wet-lease dispute was a core proceeding that could be determined by the bankruptcy court because the dispute involved the effect of a post-petition contract on the collective bargaining agreement. App. A, 19a-20a. Narrowly construing 28 U.S.C. § 157(d), the court found no impediment to bankruptcy court jurisdiction because the wet-lease dispute involved merely a routine application of the RLA. App. A, 20a-21a. Accordingly, the court reversed the wet-lease portion of the district court's decision. App. A, 20a.[12]

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[11] Judge Miner dissented from this portion of the decision, stating that, "[by] obtaining relief in the Bankruptcy Court in the context of an action to enforce an automatic stay, Eastern is able to avoid compliance with a carefully-drawn statute enacted by Congress to govern labor-management relations in a bankruptcy reorganization." App. A, 25a.

[12] The court also held that the bankruptcy court's exercise of its equitable power to enjoin the lawsuit under section 105 is subject to the same considerations as the court set forth for application of the automatic stay. App. A, 21a-22a. The court of appeals remanded

REASONS FOR GRANTING THE WRIT

This case presents issues of major significance to the litigation of labor and other non-bankruptcy federal causes of action during a Chapter 11 bankruptcy case which merit this Court's review. The issues involve three statutory sections enacted as part of BAFJA in response to this Court's decisions in *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513 (1984), and *Northern Pipeline Construction Co.* v. *Marathon Pipeline Co.*, 458 U.S. 50 (1982).

The first issue posed is whether a bankruptcy court can enjoin and determine a pure labor law action seeking enforcement of a collective bargaining agreement and the RLA where the collective bargaining agreement has not been modified or rejected under section 1113. Section 1113 establishes significant procedural and substantive standards for modification of a collective bargaining agreement and contains an extraordinary provision unequivocally enacting Congress' intention that "no" other provision of the Bankruptcy Code "be construed" to permit alteration or modification of a collective bargaining agreement "prior to compliance" with the provisions of section 1113. 11 U.S.C. § 1113(f). By permitting the bankruptcy court to utilize other Code provisions to truncate a federal district court lawsuit seeking to enforce a collective bargaining agreement, the court of ap-

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to the district court ALPA's claim that the Norris-LaGuardia Act removed jurisdiction from the bankruptcy court to issue its injunction and various issues concerning the merits of the wet-lease decision. App. A, 22a.

Granting certiorari is appropriate because the decision of the court below is "fundamental to the further conduct of the case." *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947) (quoting *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945)); *see* 12 Moore's Federal Practice ¶ 434.01, 6-42-6-43 (2d Ed. 1990) ("'finality' of an order or judgment is not a prerequisite to petitioning the Supreme Court for a writ of certiorari . . . .") (footnote omitted); *see, e.g.*, *Begier* v. *IRS*, 110 S. Ct. 2258 (1990) (*affirming* 878 F.2d 762 (3d Cir. 1989)).

peals permitted a modification of that agreement in direct contravention of the requirements of section 1113 and Congress' clear command.

Second, by holding that the bankruptcy court could hear and determine as a "core" matter pure federal labor law issues, the court of appeals misinterpreted the provisions of 28 U.S.C. § 157(b) and placed itself in direct conflict with other courts of appeal. This Court has recognized the importance of resolving a conflict within the circuits in defining "core" proceedings. *In re Ben Cooper*, 896 F.2d 1394 (2d Cir. 1990), *cert. granted*, 110 S.Ct. 3236, *vacated*, 111 S.Ct. 425 (1990).

Finally, section 157(d) provides that a district court "shall" withdraw a proceeding from the bankruptcy court if resolution of the proceeding requires consideration of bankruptcy and other federal laws. Pursuant to the clear dictates of the statute, a federal labor law cause of action originally brought in the bankruptcy court must be removed to a federal district court. It is violative of that statutory scheme for a bankruptcy court to enjoin and determine the merits of such a non-bankruptcy cause of action when the cause of action originates in a federal district court. The court of appeals in the instant case placed its imprimatur on a line of district court cases that have ignored the plain meaning of section 157(d) and have permitted withdrawal to the district court only when stringent, judicially-created requirements are met —requirements that have gone so far as to require the presence of a legal question of first impression. In so doing, the Second Circuit placed itself in conflict with numerous other lower courts. This case presents a unique opportunity for the Court to review the application of section 157(d).

I. A BANKRUPTCY COURT DECISION ORDERING DISMISSAL OF A DISTRICT COURT CAUSE OF ACTION WHICH ALLEGES VIOLATIONS OF A COLLECTIVE BARGAINING AGREEMENT AND THE RAILWAY LABOR ACT, WHERE THE COLLECTIVE BARGAINING AGREEMENT HAS NOT BEEN MODIFIED OR REJECTED PURSUANT TO BANKRUPTCY CODE SECTION 1113, DIRECTLY CONFLICTS WITH THE REQUIREMENTS OF SECTION 1113 AND PRESENTS AN ISSUE OF COMPELLING IMPORTANCE WARRANTING THIS COURT'S REVIEW

A. Section 1113 is the Exclusive Provision of the Bankruptcy Code Governing Rejection or Modification of a Collective Bargaining Agreement

Congress enacted section 1113 of the Bankruptcy Code, 11 U.S.C. § 1113, in 1984 as "an elaborate and thoroughgoing revision of the rejection process for union contracts." *In re K&B Mounting, Inc.*, 50 Bankr. 460, 462 n.3 (Bankr. N.D. Ind. 1985) (quoting Gibson, *The New Law on Rejection of Collective Bargaining Agreements in Chapter 11*, 58 Am. Bankr. L.J. 325, 327 n.1 (1984)). The section sets forth strict, detailed requirements that a debtor must follow before a bankruptcy court may approve the debtor's modification or rejection of a collective bargaining agreement.

Specifically, section 1113 provides that a debtor, before seeking to modify or reject a collective bargaining agreement, must propose to the union the modifications it seeks, provide the union with the information needed to evaluate its proposal, and confer in good faith with the union in an attempt to reach accord on the proposal. 11 U.S.C. § 1113(b); *see United Steelworkers* v. *Unimet Corp.*, 842 F.2d 879, 882 (6th Cir.), *cert. denied*, 488 U.S. 828 (1988); *In re Century Brass Prods., Inc.*, 795 F.2d 265, 273 (2d Cir.), *cert. denied*, 479 U.S. 949 (1986). Before a bankruptcy court may approve an application to reject a collective bargaining agreement, the

court must be satisfied that the debtor has proposed only those "necessary modifications" to the agreement which are "necessary" to a successful reorganization, that the proposed modifications fairly and equitably spread the economic sacrifice, that the union rejected the employer's proposed modifications without good cause, and that the balance of equities favors rejecting the agreement. 11 U.S.C. § 1113(c); *see Unimet Corp.*, 842 F.2d at 882; *Century Brass*, 795 F.2d at 273.

Section 1113 provides in two different subsections that its provisions are the exclusive remedy in the Code for a debtor to modify a collective bargaining agreement. First, section 1113(a) provides that a debtor may reject a collective bargaining agreement "only in accordance with the provisions of this section." Second, section 1113(f) contains an all-embracing and unique limitation on judicical construction of any other Code section to permit alteration of a collective bargaining agreement:

> [n]o provision of [the Code] shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

11 U.S.C. § 1113(f). Thus, Congress made clear its command that a debtor not achieve modification or rejection of a labor contract by means of section 362, 105 or *any* section of the Code *other* than section 1113. As the district court concluded, absent a debtor's compliance with all the requirements of section 1113, "labor contract enforceability is unaffected by the bankruptcy laws, including the automatic stay." App. C, 65a.

The clear meaning of the language of section 1113 is buttressed by its legislative history. Congress enacted section 1113 in response to *Bildisco*. In *Bildisco*, this Court, relying upon several provisions of the Bankruptcy Code, including the automatic stay, held that a debtor,

after filing a bankruptcy petition, could unilaterally abrogate a collective bargaining agreement. 465 U.S. at 529-30. As the court of appeals noted, Congress enacted section 1113 as a legislative response to *Bildisco* in order to ensure that collective bargaining agreements remain enforceable in bankruptcy absent compliance with section 1113. App. A, 10a; *see also Sheet Metal Workers' Int'l Ass'n* v. *Mile Hi Metal Sys.*, 899 F.2d 887, 889-90 (10th Cir. 1990); *Unimet Corp.*, 842 F.2d at 882; *Truck Drivers Local 807* v. *Carey Transp., Inc.*, 816 F.2d 82, 88 (2d Cir. 1987); *Wheeling-Pittsburgh Steel Corp.* v. *United Steelworkers*, 791 F.2d 1074, 1081-83 (3d Cir. 1986). Indeed, Senator Packwood, one of the sponsors of the legislation and the draftsman of the language that was later enacted as section 1113(f),[13] stated:

> The amendments also prohibit the trustee from unilaterally altering or terminating the labor agreement *prior to compliance with the provisions of the section* . . . th[is] provision overrules the 5-4 portion of the Supreme Court's *Bildisco* decision and means that *the labor contract is enforceable and binding on both parties until a court approved rejection or modification.*

130 Cong. Rec. S8898 (daily ed., June 29, 1984) (emphasis added).[14]

B. Section 1113 Bars the Application of the Automatic Stay to a District Court Lawsuit Seeking Enforcement of a Collective Bargaining Agreement

Although stating that it was construing section 1113(f) "quite literally," App. A, 11a, the court of appeals interpreted that section to be "circumstance" specific rather

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[13] Sen. Amendment No. 3112, to H.R. 5.74, 94 Cong., 2d Sess. (1984); 130 Cong. Rec. S6181 (daily ed., May 22, 1984).

[14] Since there was no Senate or House report on section 1113, the statements made by individual sponsors of the legislation constitute the "only authoritative indications of Congressional intent." *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 527 (1982); *see also* App. A, 10a.

than section specific. App. A, 12a. The court of appeals concluded that "Congress did not choose to direct § 1113(f) at any specific [Bankruptcy Code] provision . . .," *id.*, thereby ignoring that Congress, fearful of judicial interpretation of other Bankruptcy Code provisions to nullify the exclusive provisions of section 1113, expressly provided that the statute vitiated *every other* Bankruptcy Code provision to the extent that such provisions could be interpreted in any way to alter collective bargaining agreements.[15]

Venturing forth precisely where Congress feared the judiciary would tread, the court of appeals ignored section 1113(f)'s exclusive provision, rejected a "bright line rule," App. A, 13a, and opined that a "case by case adjudication" of the continuing application of the automatic stay to collective bargaining agreements was "*preferable*." App. A, 13a-14a (emphasis added). The court went on to apply its judicially "preferred" interpretation of the statute in a manner which enjoined ALPA's district court lawsuit and violated the plain requirements of the statute.

1. *The Automatic Stay is not Intended to Centralize the Resolution of Lawsuits in the Bankruptcy Court*

The court of appeals concluded that the automatic stay reflected two allegedly unrelated policies: First, providing a debtor with a "breathing spell" from cred-

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[15] As the district court correctly concluded:

> Congress, although it did not amend the language of section 362, effectuated the same end in the language of section 1113(f) —only there it expressed its purpose in a more thoroughgoing fashion that would prevent not only the automatic stay but any other lurking provision of Title 11 from interfering with enforcement of collective labor agreements.

App. C, 69a; *cf. Watts* v. *Pennsylvania Housing Financing Co.*, 876 F.2d 1090, 1096 (3d Cir. 1989) (holding that a specific exception to section 362 was unnecessary when the "[contrary] intent of Congress appears clear" in section 365, which "unequivocally and without qualification" governs the dispute at issue).

itors and lawsuits, and second, permitting the bankruptcy court "to centralize" disputes in order that "the reorganization can proceed efficiently, *unimpeded by uncoordinated proceedings in other arenas.*" App. A, 8a (emphasis added). The court of appeals correctly concluded that "to the extent the purpose of the automatic stay is to give the debtor a 'breathing spell,' it cannot be reconciled with § 1113, which provides the sole method by which a debtor may obtain a 'breathing spell' from its obligations under a collective bargaining agreement." *Id.*[16] However, the court of appeals concluded that the "importance" of the centralization policy precluded the "bright line" application of section 1113 to permit collective bargaining agreement enforcement outside the bankruptcy court. App. A, 13a.

Contrary to the assertion of the court of appeals, centralization of lawsuits in the bankruptcy court *per se* is not one of the purposes of the automatic stay.[17]

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[16] The court of appeals concluded, in the alternative, that either the automatic stay did not stay the prosecution of lawsuits in the bankruptcy court, *or* that the court would interpret the automatic stay not to bar such lawsuits. App. A, 17a-18a. The former conclusion is highly questionable in light of this Court's statement in *Bildisco* that, pursuant to the automatic stay, recovery on a labor law cause of action could "be had only through, the *administration of the claim* in bankruptcy," 465 U.S. at 529-30 (emphasis added), and the precedent in lower courts cited by the court of appeals holding that the automatic stay bars lawsuits in the bankruptcy court. App. A, 17a. The court of appeals' alternative determination deflects the question of congressional intent. As the district court concluded, "the evident legal uncertainty as to the availability of the bankruptcy court as a forum in which workers automatically could obtain a hearing on claims brought to enforce labor rights forcefully undercuts the contention that Congress had understood bankruptcy courts to be the forum of first resort." App. C, 69a.

[17] Congress certainly did not intend in enacting section 1113 to centralize in the bankruptcy court collective bargaining agree-

Rather, the generally enunciated purpose of the automatic stay, in addition to giving the debtor a "breathing spell," is to protect creditors by ensuring that creditors' rights are adjudicated at the same time. The House and Senate reports on section 362(a) make no mention of an intention to centralize disputes; they make clear that the purposes of the automatic stay are to give the debtor a "breathing spell" and to make possible a procedure whereby "all creditors are treated equally." Sen. Rep. No. 95-989, 95th Cong., 2d Sess. 49, 54 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5835, 5840; H.R. Rep. No. 95-595, 95th Cong., 2d Sess. 340 (1978); *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6296-97. Courts have routinely agreed with these statements of the purposes of the automatic stay.[18] To the extent the purpose of the automatic stay is to prevent one creditor from having its rights adjudicated before another creditor, the stay cannot be reconciled with section 1113. Since the automatic stay and section 1113 thereby conflict, the more recently enacted provision must prevail. *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 155 (1976); *see* App. A, 13a.

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ment enforcement actions. Section 1113(f), on its face, applies only to *debtor-initiated* actions. As the district court concluded, "[a]bsent the debtor's request for modification, the statute reveals no purpose to channel all actions to enforce or arbitrate existing, unmodified agreements into the single forum of the bankruptcy court." App. C, 66a. *See also* App. A, 27a (Miner, J., dissenting).

[18] *See Martin-Trigona* v. *Champion Fed. Sav. & Loan Ass'n*, 892 F.2d 575, 577 (7th Cir. 1989); *In re Parr Meadows Racing Ass'n, Inc.*, 880 F.2d 1540, 1545 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 869 (1990); *GATX Aircraft Corp.* v. *M/V Courtney Leigh*, 768 F.2d 711, 716 (5th Cir. 1985); *see also* 2 *Collier on Bankruptcy* ¶ 362.01, 362-19 (15th ed. 1990) (automatic stay serves "the twin goals of bankruptcy—a fresh start for the debtor and *equality of distribution to creditors*") (emphasis added).

2. *Application of the Automatic Stay to a District Court Lawsuit Seeking Enforcement of a Collective Bargaining Agreement in Order to Effect a Centralization of Disputes in the Bankruptcy Court is Inconsistent with the Exclusive Requirements of Section 1113*

To the extent the automatic stay is intended, as viewed by the court of appeals, to implement a "centralization" of litigation in the bankruptcy court, and thereby a reorganization "unimpeded" by uncoordinated proceedings and controlled in "manner" by the bankruptcy court, the effect of the stay can only be to block or delay indefinitely the resolution of a lawsuit to enforce a collective bargaining agreement—in effect, a "breathing spell" under a different name. Congress has made a specific determination in section 1113 that, absent compliance with its exclusive requirements, bankruptcy cases are required to bear the potential burden of being "impeded" by enforceable collective bargaining agreements. The automatic stay is clearly being utilized to defeat the exclusive provisions of section 1113 if construed to permit a bankruptcy court to control its calendar and the course of litigation so that the bankruptcy case remains "unimpeded" by the lawsuit.

Neither, as the district court noted, can the special expertise of the bankruptcy court provide a basis for enforcing an alleged centralization policy of the automatic stay in this context.[19] The question in a collective bargaining agreement enforcement action is simply "what the contract or labor laws require." App. C. 67a n.9. As this court concluded even before the enactment of section 1113, such questions are "outside the field of [the

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[19] Indeed, by statutory design the bankruptcy courts were not created as neutral tribunals for such issues as arise under labor law, "[u]nder [the bankruptcy] statutory scheme the federal courts are directed to protect employers and in the [labor law statutory scheme] they are required to be neutral." *Eastern Air Lines, Inc.* v. *International Ass'n of Machinists*, 121 Bankr. 428, 433 (S.D.N.Y. 1990), *aff'd*, 923 F.2d 23 (2d Cir. 1991) (per curiam).

bankruptcy court's] expertise." *Bildisco*, 465 U.S. at 526-27. Accordingly, there is no basis to enforce the automatic stay for centralization of labor law actions in order to obtain bankruptcy court "expertise."

Finally, application of the automatic stay to lawsuits to enforce collective bargaining agreements and labor law would not centralize labor law disputes in the bankruptcy court. The court of appeals properly held that the bankruptcy court must permit grievance and arbitration proceedings to go forward outside the bankruptcy court. Proceedings to enforce a collective bargaining agreement and labor law rights before the National Labor Relations Board [20] or proceedings before the National Mediation Board [21] are not stayed by application of section 362. Thus, the import of the court of appeals' ruling, rather than centralizing labor disputes in the bankruptcy court, has the anomalous effect of establishing an exception to the norm of the resolution of labor disputes outside the bankruptcy court.[22]

In sum, while the court of appeals correctly rejected the application of the automatic stay to a labor arbitration, the court of appeals erred in failing to apply the same plain meaning of the statute to reject the application of the automatic stay to a lawsuit to compel arbitra-

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[20] *See NLRB* v. *Edward Cooper Painting, Inc.*, 804 F.2d 934, 941 (6th Cir. 1986); *Ahrens Aircraft, Inc.* v. *NLRB*, 703 F.2d 23, 24 (1st Cir. 1983); *NLRB* v. *Evans Plumbing Co.*, 639 F.2d 291, 293 (5th Cir. Unit B 1981); *In re Nicholas, Inc.*, 55 Bankr. 212, 214 (Bankr. D.N.J. 1985); *Worldwide Detective Bureau*, 296 N.L.R.B. No. 20 (1989), ALJ's op. at 2 n.2, 22; *Accurate Die Casting Co.*, 292 N.L.R.B. No. 106 (1989), ALJ's op. at 7.

[21] *In re Continental Airlines, Inc.*, 50 Bankr. 342, 351 (S.D. Tex. 1985), *aff'd*, 790 F.2d 35 (5th Cir. 1986).

[22] Further, a debtor may file labor lawsuits outside the bankruptcy court on issues of its choosing. *See e.g., Eastern Air Lines, Inc.* v. *Air Line Pilots Ass'n, Int'l*, 920 F.2d 722 (11th Cir. 1990).

tion and enforce a collective bargaining agreement.[23] Particularly in light of ever-increasing bankruptcy filings,[24] review by this Court is necessary to enforce clear congressional intent on this issue of overwhelming importance to the adjudication of labor disputes during a Chapter 11 bankruptcy proceeding.

II. THE RULING BY THE COURT OF APPEALS THAT THE WET-LEASE DISPUTE IS A CORE PROCEEDING CONFLICTS WITH THE JURISDICTIONAL PROVISION OF 28 U.S.C. § 157(b) AND DECISIONS OF OTHER CIRCUITS AND PRESENTS AN ISSUE OF COMPELLING IMPORTANCE WARRANTING THIS COURT'S REVIEW

Pursuant to 28 U.S.C. § 157(b)(1), the bankruptcy court may hear, determine, and issue final orders and judgments in a "core" proceeding, subject to appellate review in the district court. *See* 28 U.S.C. § 158(a). If a matter is not a core proceeding, then, absent the consent of the parties, the bankruptcy court may only issue proposed findings of fact and conclusions of law subject to *de novo* review in the district court. 28 U.S.C. § 157(c)(1).

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[23] This Court has held that a bankruptcy court's equitable powers under section 105(a) "*must and can only be exercised within the confines of the Bankruptcy Code.*" *Norwest Bank Worthington* v. *Ahlers*, 108 S. Ct. 963, 968-69 (1988) (emphasis added). 11 U.S.C. § 105(a). Thus, section 105 may not be invoked to permit a debtor to alter its collective bargaining agreement where the Code otherwise explicitly provides exclusive procedures for such relief.

[24] *See* Annual Report of the Director of the Administrative Office of the United States Courts 26-27 (1989) (in 1989, pending bankruptcy caseload rose to an all-time high of 879,340 petitions); Fatsis, *As Economy Staggers, Bankruptcy Becomes Field for the 1990s*, Associated Press, Dec. 20, 1990 (NEXIS) (bankruptcy filings for year ended June 30, 1990 are double the 1981 figure; 10 of the 25 biggest bankruptcies in history occurred in the prior eighteen months).

In the view of the court of appeals, the bankruptcy court had jurisdiction to determine the wet-lease lawsuit as a "core" proceeding under 28 U.S.C. § 157(b)(2) because: (a) a post-petition contract with the debtor was involved, and (b) the dispute affected the administration of the estate. App. A, 19a-20a. The court's conclusion that the bankruptcy court could fully adjudicate the wet-lease lawsuit, which arises solely under the RLA, is contrary to the statutory language and legislative intent of section 157(b). Section 157(b) was enacted in response to this Court's decision in *Marathon* in order to limit the full adjudicatory power of the bankruptcy court to those matters central to the federal bankruptcy power. The decision of the court of appeals, while consistent with its prior decision in *Ben Cooper*, improperly expands the statutory limits on the bankruptcy court's jurisdiction and conflicts with decisions of other circuits.

In *In re Wood*, 825 F.2d 90 (5th Cir. 1987), the Fifth Circuit held that "core" matters consist of substantive rights created by bankruptcy law, while "none-core" matters consist of actions which could exist independent of the bankruptcy. Because the statute itself gives no definition of "core" and "non-core" proceedings--providing only a non-inclusive list of core proceedings, 28 U.S.C. § 157(b)(2)—the Fifth Circuit derived its formulation from this Court's decision in *Marathon*, and Justice Brennan's use of the word "core" in describing the federal bankrupcty power as "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power. . . ." *Wood*, 825 F.2d at 95 (*quoting Marathon*, 458 U.S. at 71). With respect to the state law rights at issue in *Marathon*, Justice Brennan wrote that the relationship of the state law claim to the bankruptcy did not change the essential nature of that non-bankruptcy claim, because "the plaintiff would be able to proceed against the defendant on the state law contractual claim." *Id.* at 95-96 (*quoting Marathon*, 458 U.S. at 72 n.26). The Fifth Circuit concluded that:

> If the proceeding does not invoke a substantive right created by federal bankruptcy law and is one that could exist outside of bankruptcy, it is not a core proceeding; it may be *related* to the bankruptcy because of its potential effect, but under Section 157 (c)(1), it is an "otherwise related" or non-core proceeding.

Id. at 97.

Even though *Wood* involved a state law claim, the *Wood* formulation has been followed by other courts of appeal which have held that non-bankruptcy claims arising under state law or federal law are not "core" proceedings. *See Barnett* v. *Stern*, 909 F.2d 973, 981 (7th Cir. 1990) (action brought under RICO); *In re Davis*, 899 F.2d 1136, 1140-41 (11th Cir.) (Equal Access to Justice Act), *cert. denied*, 111 S.Ct. 510 (1990); *Howell Hydrocarbons, Inc.* v. *Adams*, 897 F.2d 183, 190 (5th Cir. 1990) (RICO action); *Hays & Co.* v. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1156-57, n.9 (3d Cir. 1989) (federal and state securities law).

In direct contrast to *Wood* and its progeny, the court of appeals, relying upon its decision in *Ben Cooper*, concluded that the bankruptcy court had jurisdiction over the wet-lease lawsuit.[25] *Ben Cooper* presents, in part, the issue raised here by petitioner, an issue which is the subject of a conflict between the courts of appeals—the standard for defining "core" versus "non-core" proceedings. In *Ben Cooper*, the court of appeals determined that the insurance dispute at issue was a core proceeding based upon the post-petition timing of the contract, not on the underlying nature of the agreement. *See also In re Arnold Print Works*, 815 F.2d 165 (1st Cir. 1987). That

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[25] This Court has previously granted a writ of certiorari in *Ben Cooper*, 110 S. Ct. 3236, *vacated*, 111 S. Ct. 425 (1990), and after a subsequent ruling by the court of appeals, has pending a new petition for certiorari.

determination conflicts with the appropriate interpretation of "core" advanced by the Fifth Circuit in *Wood*.[26]

The conclusion of the court of appeals that the "ramifications" of the wet lease dispute "on the administration of the estate are of sufficient importance to justify bankruptcy court jurisdiction," App. A, 20a, misreads the scope of "core" proceedings. Congress enumerated specific "core" matters in section 157(b)(2), all of which, consistent with the *Marathon* decision, describe traditional debtor-creditor proceedings. The court of appeals relied upon the so-called "catchall" provision found in section 157(b)(2)(A). That subsection provides that "matters concerning the administration of the estate" are "core" proceedings. Instead of interpreting this provision in a manner consistent with the limited framework of a core proceeding affecting the restructuring of the debtor-creditor relationship, the court of appeals has in effect

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[26] Additionally, the court of appeals' application of *Ben Cooper* here has the effect of drawing the bankruptcy court even farther afield from traditional bankruptcy matters. The court of appeals determined that the federal labor law questions at issue in this case can be finally adjudicated by the bankruptcy court based upon the mere presence of a post-petition wet-lease agreement, even if the dispute in question is not between the parties to the wet-lease agreement. In *Ben Cooper* and *Arnold Print Works*, disputes under post-petition contracts were determined to be "core" matters because the contracting parties were, in effect, dealing with officers of the bankruptcy court and the subject of such contracts was estate property. *See Ben Cooper*, 896 F.2d at 1399; *Arnold Print Works*, 815 F.2d at 169-70. Here, ALPA is not a party to the post-petition contract that gave rise to the dispute. Moreover, ALPA's dispute with the debtor arises under a pre-petition collective bargaining agreement. Further, collective bargaining representatives like ALPA do not enter into a particular new post-petition business transaction with a debtor. Rather, they continue carrying out their obligations as representatives of a class or craft of the carrier's employees under collective bargaining agreements that, pursuant to the RLA, do not expire but become "amendable," and that, pursuant to the Bankruptcy Code, can only be modified consistent with the exclusive provisions of section 1113.

eliminated non-core matters by reading this provision to include matters which *affect*, rather than concern, the administration of the estate. The distinction between "concern" and "affect" is critical because the latter is similar to the broad grant of jurisdiction eliminated under BAFJA.[27] While Congress did not change the range of matters subject to the bankruptcy jurisdiction of the federal courts in BAFJA, Congress restricted the types of matters that could be fully adjudicated in the bankruptcy courts. *Wood*, 825 F.2d at 93.

Other circuits construing the enumerated matters in section 157(b), including the catchall provision, have cautioned that these provisions should be given restricted meaning consistent with the statutory language and intent.[28] Thus, "matters concerning the administration of the estate" are, by definition, matters unique to bankruptcy cases. 1 *Collier on Bankruptcy* ¶ 3.01, 3-39-3-40 (15th ed. 1989).

The effect of the interpretation of the court of appeals is to render meaningless the statutory limitations on bankruptcy court jurisdiction. Here, as in *Ben Cooper*, the court of appeals has charted a path in derogation of the statutory scheme, a path creating a conflict with other courts of appeal. That conflict on this important jurisdictional question merits review by this Court.

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[27] Prior to BAFJA, bankruptcy court jurisdiction extended to all civil proceedings arising under title 11 or arising in or related to cases under title 11. 28 U.S.C. §§ 1471(b), (c) (repealed).

[28] *See Barnett*, 909 F.2d at 979; *In re Meyertech Corp.*, 831 F.2d 410, 416 (3d Cir. 1987); *In re Castlerock Properties*, 781 F.2d 159, 162 (9th Cir. 1986); *see also In re Cassidy Land & Cattle Co., Inc.*, 836 F.2d 1130, 1132 (8th Cir.), *cert. denied*, 486 U.S. 1033 (1988).

III. ADJUDICATION IN THE BANKRUPTCY COURT OF A CAUSE OF ACTION UNDER THE RAILWAY LABOR ACT IS INCONSISTENT WITH 28 U.S.C. § 157(d) AND PRESENTS AN ISSUE OF CONFLICT IN THE LOWER COURTS AND OF COMPELLING IMPORTANCE WARRANTING THIS COURT'S REVIEW

In determining whether ALPA's challenge under the RLA to Eastern's wet-leasing "was properly presented to the bankruptcy court, or could have been," App. A, 18a, the Second Circuit properly determined that it was necessary to confront the application of the mandatory withdrawal provision of the BAFJA, 28 U.S.C. § 157(d). That provision states that:

> [t]he district court *shall . . . withdraw a proceeding* if the court determines that *resolution* of the proceeding *requires consideration of both* Title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

28 U.S.C. § 157(d) (emphasis added). The court of appeals determined that dismissal of a lawsuit brought in the district court was proper because mandatory withdrawal of the lawsuit to the district court would not have been required if the lawsuit had originated in the bankruptcy court. App. A, 20a. This conclusion is contrary to the specific, mandatory language of section 157(d), and raises an issue of importance concerning which the lower courts have offered conflicting interpretations.

The command of section 157(d) is clear. Where, at a minimum, non-bankruptcy federal law provides the rule of decision governing a proceeding in bankruptcy, the case must be heard by an Article III tribunal. Section 157(d) represents a congressional judgment to limit the jurisdiction of the Article I bankruptcy courts by requiring the adjudication of non-bankruptcy federal law claims in the Article III courts.

To justify its conclusion that ALPA's wet-leasing action could have been brought and conclusively adjudicated by the bankruptcy court, the court below approved a stringent, judicially-created precondition to withdrawal which is at odds with the clear language of the statute. In conjunction with its conclusion that ALPA's wet-leasing action is a core proceeding within the meaning of section 157(b)(2)(A), App. A, 19a-20a, the court of appeals has returned to the bankruptcy courts a broad grant of independent judicial authority which Congress plainly intended to curtail in light of this Court's decision in *Marathon*.

Bankruptcy jurisdiction prior to *Marathon* violated the requirements of Article III by granting essential judicial functions to tribunals lacking constitutional assurances necessary to an independent judiciary. *See supra* at 24. In this regard, the *Marathon* Court rejected the contention that the bankruptcy courts were a constitutionally permissible adjunct of the district court. 458 U.S. at 87. In response to *Marathon*, Congress sought to constitute the bankruptcy court as a true adjunct of the district courts, specifically concerned with the administration of the Bankruptcy Code. It assigned plenary bankruptcy jurisdiction to the district court, *see* 28 U.S.C. § 1334(a), subject to a power to return bankruptcy matters to the bankruptcy courts. 28 U.S.C. § 157(a). In Section 157, Congress also limited the universe of proceedings in which bankruptcy courts could issue final orders. *See* 28 U.S.C. §§ 157(b), (c). The mandatory withdrawal provision complements the scheme by ensuring that the bankruptcy court functions as a specialized adjunct of the district court and not as a cognate tribunal on questions of general federal law.[29] By requiring the district courts to withdraw the reference of an adversary proceeding re-

[29] Indeed, it is clear Congress intended that the mandatory withdrawal provision extend to questions of federal labor law. *See* 130 Cong. Rec. H1849-50 (daily ed., March 21, 1984) (remarks of Rep. Kastenmeier).

quiring consideration of non-bankruptcy federal law, section 157(d) furthers Congress' intent by insuring that the jurisdiction of the bankruptcy courts is limited to its narrow area of expertise, Title 11.

The decision below requires causes of action brought solely under the RLA to be adjudicated in the bankruptcy court. The court below followed the lead of district court cases in the Second Circuit, App. A, 20a, and in the Fourth Circuit limiting mandatory withdrawal to cases of "first impression" under federal law. In these cases the bankruptcy court has been permitted to hear and decide all cases governed by non-bankruptcy federal law judged to "merely involve a routine application of established [federal] legal standards." *In re Ionosphere Clubs, Inc.*, 103 Bankr. 416, 420 (S.D.N.Y. 1989).[30] By adopting this standard, the court of appeals has effectively engrafted a judicially-created requirement onto the statute. Nowhere does the mandatory withdrawal provision require that the federal issue necessary to resolution of the proceeding present a "difficult" question—as opposed to the

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[30] *Accord In re Carolina Produce Distrib., Inc.*, 110 Bankr. 207, 209 (W.D.N.C. 1990); *In re Chadbourne Indus., Ltd.*, 100 Bankr. 663, 667 (S.D.N.Y. 1989); *In re Asinelli, Inc.*, 93 Bankr. 433 (M.D.N.C. 1988); *In re Johns-Manville Corp.*, 63 Bankr. 600, 602 (S.D.N.Y. 1986). In *Ionosphere Clubs*, for example, the district court denied a section 157(d) motion in an adversary proceeding brought by Eastern to enjoin alleged acts of strike misconduct, even though the district court recognized the necessity for the trial court to review the jurisdictional prerequisites of the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*, which the district court viewed as a "routine" application of law. 103 Bankr. at 420. The bankruptcy court proceeded to issue an injunction in clear conflict with this Court's decision in *Brotherhood of Ry. Trainmen, Enterprise Lodge No. 27* v. *Toledo, P. & W. R.R.*, 321 U.S. 50 (1944). *See In re Ionosphere Clubs, Inc.*, 108 Bankr 901, 943-45 (Bankr. S.D.N.Y. 1989). This failure to properly apply settled law was eventually corrected many months later on appeal. *Eastern Air Lines, Inc.* v. *International Ass'n of Machinists*, 121 Bankr. 428 (S.D.N.Y. 1990), *aff'd*, 923 F.2d 26 (2d Cir. 1991) (per curiam).

"routine" judicial task of declaring what the law is and applying that law to a set of facts.[31]

The court of appeals' determination concerning section 157(d) also merits review because it creates a conflict with the approach taken by other courts which have applied the standard articulated in the leading decision under section 157(d), *In re White Motor Corp.*, 42 Bankr. 693 (N.D. Ohio 1984). In *White Motor*, the court held that section 157 (d) required that a proceeding be withdrawn only when consideration of federal law "is necessary for the *resolution* of a case or proceeding," *i.e.*, when the case "cannot be resolved without substantial and material consideration of non-bankruptcy federal law." *Id.* at 703, 704. Applying this standard, numerous courts have held, without more, that bankruptcy-related claims must be heard

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[31] As demonstrated in this case, the court of appeals' approach is incompatible with the plain thrust of the mandatory withdrawal provision. Contrary to the court of appeals' conclusion, this case *does* require the bankruptcy court to "engage itself in the intricacies of the RLA," App. A, 21a, because ALPA's claims require detailed consideration of this Court's decision in *Florida East Coast*, which limits a carrier's ability to alter the terms and conditions of a collective bargaining agreement during a strike. A decision on the merits will require consideration of a number of unsettled issues under *Florida East Coast*. In particular, the court will have to examine whether the carrier properly altered status quo working conditions prior to obtaining court approval. The district court's opinion in *Florida East Coast*, affirmed by this Court, held that the carrier had to adhere to the collective bargaining agreement "except upon specific authorization of this Court after a finding of reasonable necessity." 384 U.S. at 242. *But cf. Railway Labor Executives Ass'n* v. *Boston & Maine Corp.*, 639 F.Supp. 1092, 1106 n.10 (D.Me.) (prior approval not required), *modified on other grounds*, 808 F.2d 150 (1st Cir. 1986), *cert. denied*, 484 U.S. 830 (1987). Second, this case raises the question of whether and to what extent *Florida East Coast* relief can be afforded in the case of a sympathy, as opposed to a primary, strike —an issue of first impression.

in an Article III court whenever federal law provides the rule of decision.[32]

Review of this case would clarify a central component of the bankruptcy jurisdiction scheme whose interpretation has divided the lower federal courts. Because decisions on motions to withdraw the reference under section 157(d) have been held to be not directly appealable,[33] the construction of that provision has yet to be—and is unlikely to be—fully developed by the circuit courts of appeal. Review of this case will afford guidance to the lower federal courts in an area of central importance to the scheme of bankruptcy jurisdiction.

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[32] *See, e.g., Price* v. *Craddock*, 85 Bankr. 570 (D. Colo. 1988) (debtor's counterclaim under securities laws warrants withdrawal); *Burger King Corp.* v. *B-K Of Kansas, Inc.*, 64 Bankr. 728 (D. Kan. 1986) (action against the debtor alleging violation of federal trademark law must be withdrawn); *United States* v. *ILCO, Inc.*, 48 Bankr. 1016, 1021 (N.D. Ala. 1985) (claims against debtor under federal environmental statutes); *Michigan Milk Producers Ass'n* v. *Hunter*, 46 Bankr. 214, 216 (N.D. Ohio 1985) (antitrust counterclaim brought by bankruptcy trustee in action to determine status of claim), *appeal dismissed*, 786 F.2d 1165 (6th Cir. 1986); *In re Hartley*, 55 Bankr. 781, 785 (Bankr. N.D. Ohio 1985) (bankruptcy trustee's RICO claim); *In re Maislin Indus., Inc.*, 50 Bankr. 943, 950 (Bankr. E.D. Mich. 1985) (recommending withdrawal of action to recover alleged under payments under federal tariff schedule).

[33] *In re Lieb*, 915 F.2d 180 (5th Cir. 1990); *In re Pruitt*, 910 F.2d 1160 (3d Cir. 1990); *In re Chateaugay Corp.*, 826 F.2d 1177 (2d Cir. 1987); *In re Moens*, 800 F.2d 173 (7th Cir. 1986); *In re Kemble*, 776 F.2d 802 (9th Cir. 1985); *In re King Mem. Hosp., Inc.*, 767 F.2d 1508 (11th Cir. 1985) (per curiam); *In re Dalton*, 733 F.2d 710 (10th Cir. 1984), *cert. dismissed*, 469 U.S. 1185 (1985); *see also Tringali* v. *Hathaway Mach. Co.*, 796 F.2d 553 (1st Cir. 1986) (withdrawal decision is interlocutory) (dicta).

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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March 21, 1991

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 580, 581—August Term 1990

(Argued November 14, 1990 Decided December 21, 1990)

Docket Nos. 90-5033, 90-5035

IN RE: IONOSPHERE CLUBS, INC.
and EASTERN AIRLINES, INC.,
Debtors.

MARTIN R. SHUGRUE, JR., AS CHAPTER 11 TRUSTEE
FOR EASTERN AIRLINES, INC.,
Appellant,

—v.—

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Appellee.

Before:

MINER and TIMBERS, *Circuit Judges*,
and SPRIZZO, *District Judge*, for the Southern
District of New York, sitting by designation

Appeal from an order entered April 10, 1990, in the Southern District of New York, Robert W. Sweet, *District Judge*, reversing two orders of the bankruptcy court that stayed appellee's attempts to arbitrate a dispute arising from its collective bargaining agreement with appellant and to bring an action to enjoin a practice of appellant as violative of the collective bargaining agreement. 114 B.R. 379 (S.D.N.Y. 1990).

Affirmed in part, reversed in part and remanded.

Judge Miner concurs in part and dissents in part in a separate opinion.

TIMBERS, *Circuit Judge*:

Appellant Martin R. Shugrue, Jr., Chapter 11 Trustee for Eastern Airlines, Inc. (Eastern), appeals from an order entered April 10, 1990 in the Southern District of New York, Robert W. Sweet, *District Judge*, reversing two orders of the bankruptcy court that stayed attempts by the Air Line Pilots Association, International (ALPA) to arbitrate a dispute arising out of their collective bargaining agreement with Eastern and to prosecute a lawsuit seeking to enjoin Eastern's practice of wet-leasing aircraft and crews as violative of the collective bargaining agreement.

On March 9, 1989, Eastern filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. Subsequently, ALPA, which was engaged in a sympathy strike against Eastern, sought relief from the automatic stay to initiate an arbitration to determine whether labor protective provisions (LPPs) in the collective bargaining agreement had been triggered by Eastern's merger with Continental. The bankruptcy court, Burton R. Lifland, *Chief Bankruptcy Judge*, denied that petition. *In re Ionosphere Clubs, Inc.*, 105 B.R. 765 (Bankr. S.D.N.Y. 1989) (the LPP-decision).

After the strike began and after Eastern filed its petition for reorganization, Eastern entered into wet-lease contracts with Continental. Wet-leasing is a practice by which one airline leases aircraft and crews from another airline. ALPA commenced an action in the Southern District of Florida, seeking to enjoin this practice as violative of its collective bargaining agreement with Eastern. In response, Eastern commenced an adversary proceeding in the bankruptcy court to enjoin ALPA from prosecuting the Florida action. The bankruptcy court, Burton R. Lifland, *Chief Bankruptcy Judge*, held that ALPA's action was violative of the automatic stay and enjoined its prosecution pursuant to its powers under 11 U.S.C. § 105(a) (1988). *In re Ionosphere*

Clubs, Inc., 105 B.R. 773 (Bankr. S.D.N.Y. 1989) (the wet-lease decision).

ALPA appealed both bankruptcy court orders to the district court pursuant to 28 U.S.C. § 158(a) (1988). The district court reversed them both. The court held that 11 U.S.C. § 1113(f) (1988) precludes the application of the automatic stay and the bankruptcy court's equitable powers to any proceeding brought by a union to enforce a collective bargaining agreement against a debtor, unless and until the debtor complies with the provisions of § 1113, which regulates the termination or modification of collective bargaining agreements by a debtor in bankruptcy. *In re Ionosphere Clubs, Inc.*, 114 B.R. 379 (S.D.N.Y. 1990).

On appeal, Eastern contends that (1) § 1113(f) of the Bankruptcy Code does not preclude application of the automatic stay provisions of § 362 or of the bankruptcy court's equitable powers under § 105 to ALPA's attempts to enforce the collective bargaining agreement outside the bankruptcy court; and (2) the bankruptcy court decisions should be reinstated.

For the reasons that follow, we affirm the district court's order as to the LPP-decision and reverse its order as to the wet-lease decision. We remand the case to the district court for further consideration.

I.

We shall summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal.

This appeal involves two issues in a labor dispute between Eastern and ALPA. At all times relevant to this appeal, the relationship between the two parties was governed by a collective bargaining agreement dated February 23, 1986 and entered into pursuant to the Railway Labor Act (RLA), 45 U.S.C. § 151 *et seq.* (1988).

On March 4, 1989, the International Association of Machinists and Aerospace Workers (IAM) began a primary strike against Eastern. Soon thereafter, ALPA and the Transportation Workers Union of America struck Eastern in sympathy with the IAM. On March 9, 1989, Eastern filed a petition for reorganization under Chapter 11 of the Bankruptcy Code in the Southern District of New York. On June 21, 1989, Eastern filed a motion in the bankruptcy court to reject the collective bargaining agreement pursuant to § 1113. Eastern withdrew that motion on July 26, 1989. At the time the bankruptcy court reached the decisions under review on the instant appeal, no application under §1113 to terminate or modify the collective bargaining agreement was pending before it. Martin R. Shugrue, Jr. was appointed Trustee for Eastern on April 19, 1990.

(A)

The collective bargaining agreement contained LPPs designed to protect ALPA members in the event of a merger. The collective bargaining agreement provided that disputes arising from it would be submitted to arbitration and it set forth a procedure governing that process. Eastern was sold to Texas Air Corporation (Texas Air) within days after the collective bargaining agreement became operative. After Eastern's acquisition by Texas Air, a dispute arose as to the operation of the LPPs. On June 10, 1986, Eastern commenced an action in the Southern District of Florida, seeking a declaration that the collective bargaining agreement was invalid. That contention was rejected and Eastern was ordered to arbitrate the dispute. *Eastern Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 670 F. Supp. 947 (S.D. Fla. 1987), *aff'd*, 861 F.2d 1546 (11 Cir. 1988).

On August 6, 1986, pursuant to the provisions of the collective bargaining agreement, ALPA filed a grievance with the System Board of Adjustments, the body established to hear and determine grievances based on dis-

putes concerning the collective bargaining agreement. On March 8, 1989, the arbitration panel ruled in favor of ALPA. It concluded that the LPPs provided that, in the event of a merger, seniority lists were to be merged. The panel did not decide whether a merger had taken place that would have triggered the LPPs. The decision was not signed by all the panel members until the next day, approximately seven minutes after Eastern filed its bankruptcy petition.

On July 21, 1989, ALPA filed a motion in the bankruptcy court, seeking a determination that the arbitration decision became effective prior to Eastern's Chapter 11 filing and, thus, was not affected by the automatic stay, or, in the alternative, it sought relief from the automatic stay to implement the arbitration decision. ALPA supplemented its motion requesting relief from the automatic stay with a request to commence a second arbitration to determine whether Eastern and Continental had merged, thus triggering the LPPs. Eastern did not oppose the request for relief from the stay to implement the first arbitration decision, but did oppose the supplemental request to commence a second arbitration.

The bankruptcy court lifted the stay for the limited purpose of formally issuing the arbitration decision interpreting the LPPs, but declined to lift the stay for the purpose of allowing ALPA to initiate an arbitration to determine whether a merger had taken place. *In re Ionosphere Clubs, Inc., supra*, 105 B.R. 765. The court reasoned that issues raised in the arbitration would duplicate efforts being made by the examiner it had appointed. *Id.* at 771.

(B)

Wet-leasing refers to the practice of one airline leasing aircraft and crews from another airline. The collective bargaining agreement prohibited Eastern from engaging in this practice. It required Eastern to employ ALPA pilots on the Eastern pilot's system seniority list to perform its flying. In August 1989, since its pilots

were on strike and replacement pilots were still being trained, Eastern entered into wet-lease contracts with Continental.

On September 1, 1989, ALPA commenced an action in the Southern District of Florida (the Florida action), seeking to enjoin the wet-leasing as violative of the collective bargaining agreement and of the RLA. The district court set the case on an expedited discovery schedule. On September 25, 1989, Eastern commenced an adversary proceeding in the bankruptcy court, seeking to enjoin ALPA from prosecuting the Florida action. In its complaint, Eastern alleged that its wet-lease contracts were reasonably necessary to its continued operation during the strike.

The bankruptcy court held that the Florida action violated the provisions of the automatic stay, specifically, 11 U.S.C. § 362(a)(3) (1988), which provides for a stay of "any act . . . to exercise control over property of the estate." *In re Ionosphere Clubs, supra*, 105 B.R. at 779. The court determined that Eastern's actions were "reasonably necessary" to its continued operation during the strike and were protected under the doctrine announced in *Brotherhood of Ry. & S.S. Clerks v. Florida East Coast Ry.*, 384 U.S. 238, 248 (1966). *In re Ionosphere Clubs, supra*, 105 B.R. at 780. Finally, the bankruptcy court enjoined further prosecution of the Florida action pursuant to its powers under § 105(a). *Id.*

(C)

ALPA appealed both bankruptcy court orders to the district court pursuant to 28 U.S.C. § 158(a) (1988). The appeal from the LPP decision was assigned to Judge Sweet. The appeal from the wet-lease decision was assigned to Judge Leval. Subsequently, the two appeals were consolidated before Judge Sweet.

On April 10, 1990, the district court entered its opinion and order, reversing the orders of the bankruptcy

court in both cases. *In re Ionosphere Clubs, Inc.*, 114 B.R. 379 (S.D.N.Y. 1990). The district court reasoned that § 1113 of the Bankruptcy Code was intended to be the "exclusive . . . means in the Bankruptcy Code by which a debtor could modify or reject its collective bargaining contract obligations." *Id.* at 396. The court concluded that application of the automatic stay to bar enforcement of a collective bargaining agreement outside the bankruptcy court was precluded by § 1113(f), which provides that no provision of the Bankruptcy Code other than § 1113 should be construed to permit a trustee unilaterally to alter or terminate a collective bargaining agreement. *Id.* at 400.

This appeal followed.

II.

Initially, we set forth our standard of review. The district court order is subject to plenary review. *In re Hanratty*, 907 F.2d 1418, 1423 (3 Cir. 1990); *In re Johnson*, 901 F.2d 513, 516 (6 Cir. 1990); *In re Manville Forest Prods. Corp.*, 896 F.2d 1384, 1388 (2 Cir. 1990). "This court exercises the same review over the district court's decision that the district court may exercise [over the bankruptcy court's decision]." *Brown v. Pennsylvania State Employees Credit Union*, 851 F.2d 81, 84 (3 Cir. 1988). Accordingly, we review conclusions of law *de novo*, and findings of fact under a clearly erroneous standard. *In re Manville, supra*, 896 F.2d at 1388; *Brown, supra*, 851 F.2d at 84.

III.

This appeal raises the question of the effect of § 1113 of the Bankruptcy Code on the application of the automatic stay provisions of § 362 of the Bankruptcy Code to non-bankruptcy proceedings to enforce a collective bargaining agreement. Resolution of this dispute requires us to consider the intent of Congress in enacting these sections.

(A)

Section 362 of the Bankruptcy Code provides that the filing of a petition in bankruptcy automatically stays certain actions directed against the debtor or against the debtor's property. 11 U.S.C. § 362(a) (1988). The automatic stay provisions promote two principal purposes of the Bankruptcy Code. First, the automatic stay "provides the debtor with 'a breathing spell from his creditors.'" *Teachers Ins. & Annuity Ass'n of America* v. *Butler*, 803 F.2d 61, 64 (2 Cir. 1986) (quoting legislative history); *In re Petrusch*, 667 F.2d 297, 299 (2 Cir. 1981) (same), *cert. denied*, 456 U.S. 974 (1982). In addition, the automatic stay allows the bankruptcy court to centralize all disputes concerning property of the debtor's estate in the bankruptcy court so that reorganization can proceed efficiently, unimpeded by uncoordinated proceedings in other arenas. The Bankruptcy Code "provide[s] for centralized jurisdiction and administration of the debtor, its estate and its reorganization in the Bankruptcy Court, and [this policy] is effectuated by Sections 362 and 105 of the Code." *In re Chateaugay Corp.*, 109 B.R. 613, 621 (S.D.N.Y. 1990); *see also Hunt* v. *Bankers Trust Co.*, 799 F.2d 1060, 1069 (5 Cir. 1986); *Holland America Ins. Co.* v. *Succession of Roy*, 777 F.2d 992, 995 (5 Cir. 1985).

(B)

We turn next to § 1113 of the Bankruptcy Code. Our discussion of that section must begin with the Supreme Court's decision in *National Labor Relations Bd.* v. *Bildisco & Bildisco*, 465 U.S. 513 (1984). In *Bildisco*, the Court held, in part, that the filing of a petition in bankruptcy rendered collective bargaining agreements unenforceable. *Id.* at 532. The debtor, therefore, could terminate unilaterally the collective bargaining agreement or alter its provisions prior to seeking bankruptcy court approval for rejection of an executory contract under § 365(a). *Id.* at 533-34.

In response to *Bildisco*, Congress enacted § 1113 of the Bankruptcy Code as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"), Pub. L. No. 98-353, 98 Stat. 333, 390-91 (1984). Section 1113 governs the means by which a debtor may assume, reject or modify its collective bargaining agreement. 11 U.S.C. § 1113(a), (b) and (e) (1988). It ensures that the debtor attempt to negotiate with the union prior to seeking to terminate a collective bargaining agreement. § 1113(b). In the event such negotiations fail, it delineates the standard by which an application by the debtor to terminate the collective bargaining agreement is to be judged by the bankruptcy court and establishes a time frame in which this determination is to be made. 11 U.S.C. § 1113(c), (d) (1988). Subsection (f) provides:

> "No provision of [the Bankruptcy Code] shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of [section 1113]."

11 U.S.C. § 1113(f) (1988).

In discerning Congress' intent in enacting § 1113, we look first to the language of the statute. *United States* v. *Bonanno Organized Crime Family of La Cosa Nostra*, 879 F.2d 20, 21 (2 Cir. 1989). Subsection 1113(a) provides that a debtor "may assume or reject a collective bargaining agreement only in accordance with the provisions of [section 1113]." Subsection 1113(f) evinces an intent that other provisions of the Bankruptcy Code are inoperable to the extent that they allow a debtor to bypass the requirements of § 1113. The language of the statute indicates that Congress intended § 1113 to be the sole method by which a debtor could terminate or modify a collective bargaining agreement and that application of other provisions of the Bankruptcy Code that allow a debtor to bypass the requirements of § 1113 are prohibited.

This conclusion is supported by the legislative history of § 1113. There are no committee reports accompanying the enactment of § 1113. We look therefore to statements made by sponsors of the legislation on the floor of Congress for an expression of legislative intent. *E.g., Regents of the University of California* v. *Public Employment Relations Bd.*, 485 U.S. 589, 595-97 (1988); *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 527 (1982). In support of the legislation, Senator Packwood, one of its sponsors, stated:

> "The amendments also prohibit the trustee from unilaterally altering or terminating the labor agreement prior to compliance with the provisions of the section. This provision encourages the collective bargaining process, so basic to federal labor policy. The provision overrules the 5-4 portion of the Supreme Court's *Bildisco* decision and means that the labor contract is enforceable and binding on both parties until a court approved rejection or modification."

130 Cong. Rec. S8898 (daily ed. June 29, 1984).

Finally, the context in which § 1113 was enacted supports our conclusion. It is not disputed that § 1113 was enacted as the legislative response to the Supreme Court's decision in *Bildisco*. *In re Unimet Corp.*, 842 F.2d 879, 882 (6 Cir.), *cert. denied*, 488 U.S. 828 (1988); *Truck Drivers Local 807* v. *Carey Transp., Inc.*, 816 F.2d 82, 88 (2 Cir. 1987); *In re Century Brass Prods., Inc.*, 795 F.2d 265, 272 (2 Cir. 1986). It stands to reason, therefore, that the events that took place in *Bildisco* are representative of the ill that Congress sought to cure in enacting § 1113.

In *Bildisco*, a debtor ignored "its obligations under the collective-bargaining agreement, including the payment of health and pension benefits and the remittance to the Union of dues collected under the agreement . . . [and] refused to pay wage increases called for in the collective-bargaining agreement." *Bildisco*, *supra*, 465 U.S. at 518. Those alterations were made prior to seeking relief from

those obligations in the bankruptcy court and absent negotiation with the union.

> "Section 1113(f) reverses that part of *Bildisco & Bildisco* which held that a trustee or debtor in possession was not legally bound to a collective bargaining agreement subsequent to the filing date and prior to the court determination of the application for authority to reject such agreement. The trustee or debtor in possession must adhere to the terms of the collective bargaining agreement unless the court approves the application for rejection pursuant to section 1113(c) or grants interim relief under section 1113(e)."

5 *Collier on Bankruptcy*, ¶ 1113.01 at 1113-11 (15th ed. 1990).

We conclude, from the language of the statute, statements made by the sponsors of the legislation, and the context in which it was enacted, that Congress intended that a collective bargaining agreement remain in effect and that the collective bargaining process continue after the filing of a bankruptcy petition unless and until the debtor complies with the provisions of § 1113. *E.g., In re Unimet Corp., supra*, 842 F.2d at 884 ("section 1113 unequivocally prohibits the employer from *unilaterally* modifying *any provision* of the collective bargaining agreement"); *In re Century Brass Prods., supra*, 795 F.2d at 272 (§ 1113 "created an expedited form of collective bargaining with several safeguards designed to insure that employers did not use Chapter 11 as medicine to rid themselves of corporate indigestion"); *In re Mile High Metal Sys., Inc.*, 51 B.R. 509, 510 (Bankr. D. Colo. 1985) ("[o]ne of the primary purposes of [section 1113] was to emphasize the private collective bargaining process in an effort to avoid recourse to the bankruptcy court").

We construe subsection 1113(f) quite literally. We hold that it was meant to prohibit the applicaetion of any other provision of the Bankruptcy Code when such ap-

plication would permit a debtor to achieve a unilateral termination or modification of a collective bargaining agreement without meeting the requirements of § 1113.

(C)

We consider, on the instant appeal, a very specific question, i.e., whether Congress intended in enacting § 1113(f) to preclude the application of the automatic stay provisions of § 362 to any dispute concerning a collective bargaining agreement absent compliance with the provisions of § 1113. We find no evidence that Congress had that specific intent.

Section 1113(f) is circumstance specific rather than section specific. Congress did not choose to direct § 1113 (f) at any specific provision whose application it deemed would always permit a debtor unilaterally to alter a collective bargaining agreement. Rather, § 1113(f) presumes a particularized determination in any circumstance as to whether the application of another provision of the Bankruptcy Code will permit a debtor unilaterally to terminate or alter a collective bargaining agreement.

If Congress had intended to preclude application of the automatic stay to any dispute involving a collective bargaining agreement, it could have excepted explicitly proceedings to enforce a collective bargaining agreement from the automatic stay provisions. 11 U.S.C. § 362(b) (1988). Indeed, in enacting the legislation that included § 1113, Congress added two exceptions to the automatic stay. BAFJA, Pub. L. No. 98-353, 98 Stat. 333, 365, 371 (1984) (11 U.S.C. § 362(b)(7), (10) (1988)). Moreover, other sections of the Bankruptcy Code explicitly state that § 362 is inapplicable. *E.g.*, 11 U.S.C. § 1110 (a) (1988) (right of secured creditor with purchase money security interest in aircraft or its parts not subject to § 362); 11 U.S.C. § 1168 (1988) (right of secured creditor with purchase money security interest in rolling stock equipment or accessories used on such equipment not subject to § 362).

Since we discern no congressional intent on the specific issue before us, our analysis is governed by two rules of statutory construction. The first encourages consistent interpretations of statutes so as to give the fullest effect to congressional intent. *United States* v. *Lopez-Cavasos*, 915 F.2d 474, 479 (9 Cir. 1990); *Strobl* v. *New York Mercantile Exchange*, 768 F.2d 22, 30 (2 Cir.), *cert. denied*, 474 U.S. 1006 (1985). "'[W]hen two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective.'" *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 155 (1976) (citation omitted). The second instructs us that, when two statutes are in irreconcilable conflict, we must give effect to the most recently enacted statute since it is the most recent indication of congressional intent. *Id.* at 154.

We agree with the district court's conclusion that, to the extent the purpose of the automatic stay is to give the debtor a "breathing spell," it cannot be reconciled with § 1113, which provides the sole method by which a debtor may obtain a "breathing spell" from its obligations under a collective bargaining agreement. *In re Ionosphere Clubs, supra*, 114 B.R. at 397. Were that the only purpose of the automatic stay, we would be inclined to affirm the district court's thorough opinion in its entirety.

The automatic stay, however, also allows the bankruptcy court to protect its jurisdiction over property of the debtor's estate by ruling on the appropriate manner and forum in which such disputes should be resolved. We previously have recognized the importance of that policy in the reorganization proceedings. *Bohack Corp.* v. *Borden, Inc.*, 599 F.2d 1160, 1165 (2 Cir. 1979). In view of the importance of that policy, we conclude that a bright line rule precluding the application of the automatic stay to any situation involving a collective bargaining agreement was not intended by Congress. Rather, we believe that a case by case adjudication is

preferable. We will give effect to the automatic stay to the extent that its application is not in irreconcilable conflict with § 1113.

We hold, therefore, that § 1113(f) precludes application of the automatic stay to disputes involving a collective bargaining agreement only when its application allows a debtor unilaterally to terminate or alter any provision of a collective bargaining agreement.

IV.

We turn now to the application of the foregoing principles to the disputes at issue in the instant case. We consider the LPP decision first. Eastern contends that the district court erred in determining that § 1113(f) precluded application of the automatic stay to the arbitration that ALPA sought to commence to determine whether the LPPs in the collective bargaining agreement had been triggered. We disagree.

Eastern contends that a stay of arbitration does not deprive a union of a forum in which to enforce the collective bargaining agreement. That argument ignores the fact that adjudication of this dispute in the bankruptcy court would nullify effectively the arbitration clause in the collective bargaining agreement and would substitute the court's judgment for that of the arbitrator.

The collective bargaining agreement expressly provides for arbitration as the method of dispute resolution. "[S]ection 1113 unequivocally prohibits the employer from *unilaterally* modifying *any provision* of the collective bargaining agreement." *In re Unimet*, *supra*, 841 F.2d at 884 (emphasis in original). This prohibition applies to arbitration clauses.

> "It would be anomalous to find that Congress enacted a mandatory procedure for rejecting a collective bargaining agreement without which the agreement stays in full force and effect, and then to hold that a previously enacted section of the same statute

> —11 U.S.C. § 362, providing for a stay of claims against a debtor's estate—automatically invalidates the arbitration clause of a collective bargaining agreement . . . ."

In re Marine Pollution Serv., 88 B.R. 588, 595 (S.D. N.Y.), *rev'd on other grounds*, 857 F.2d 91 (2 Cir. 1988).

Application of the automatic stay to ALPA's attempt to invoke that provision of the collective bargaining agreement would allow Eastern unilaterally to alter the collective bargaining agreement by avoiding its obligation to arbitrate. *In re Bob's Supermarket's, Inc.*, 118 B.R. 783, 785-86 (Bankr. D. Mont. 1990); *In re Marine Pollution Serv., Inc., supra*, 88 B.R. at 595 (dicta); *see also* Haggard, *Labor Arbitration and Bankruptcy: A Trek into the Serbonian Bog*, 17 Loy. U. Chi. L.J. 171, 187-88 (1986) ("Under section 1113 of the Bankruptcy Code, a collective bargaining agreement remains in full force and effect until its rejection is approved by the bankruptcy judge or other interim relief is allowed. Thus, the debtor in possession or trustee has the contractual duty to adhere to the substantive provisions of the agreement *and* the duty to arbitrate any alleged breaches of those provisions."). In this context, application of the automatic stay is in irreconcilable conflict with § 1113(f), which requires that Eastern seek relief under the provisions of § 1113 if it wishes to avoid its obligation to arbitrate labor disputes. *Cf. In re Marine Pollution Serv., Inc.*, 89 B.R. 344, 346 (S.D.N.Y. 1988) ("if the Trustee believes that the threat of slowdowns or other disturbance is such that he wishes to undo the arbitration award, he has open to him either a return to the arbitrator or a rejection of the contract in the manner Congress prescribed in 11 U.S.C. § 1113"). We must give effect to § 1113(f) as the later expression of congressional intent.

Our holding is consistent with the purpose underlying § 1113 to the extent that it ensures that the collective

bargaining process continue unless and until the bankruptcy court grants the debtor relief under § 1113. The federal judiciary and Congress both have recognized the importance to the collective bargaining process of arbitration. *E.g.*, *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) ("arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself"); 29 U.S.C. § 173(d) (1988) (favoring method of labor dispute resolution agreed to by parties).

We hold that an arbitration brought pursuant to a provision in a collective bargaining agreement is not subject to the automatic stay since its application would allow a debtor unilaterally to avoid its obligation to arbitrate. The district court properly reversed the bankruptcy court's LPP decision.

V.

This brings us to the wet-lease decision. Eastern contends that the district court erred in reversing the bankruptcy court's determination that the Florida action was subject to the automatic stay. We agree.

(A)

Unlike the LPP decision, application of the automatic stay to the action commenced by ALPA in the Southern District of Florida did not relieve Eastern of the obligation to participate in the method of dispute resolution provided for in the collective bargaining agreement. Adjudication in the bankruptcy court itself does not violate § 1113(f). When a union seeks judicial enforcement of a collective bargaining agreement, the purposes behind §§ 362 and 1113(f) both can be promoted if the dispute can be adjudicated in the bankruptcy court.

We agree with ALPA's contention that precluding it from enforcing the collective bargaining agreement would render § 1113 illusory since a debtor would have no need to invoke it. If enforcement is foreclosed, then a union

has no recourse against unilateral modifications imposed by a debtor.

The application of § 362 to a non-bankruptcy judicial proceeding only forecloses enforcement of the collective bargaining agreement if it cannot be enforced in the bankruptcy court. Accordingly, if a union has a procedural mechanism to place the dispute before the bankruptcy court and the bankruptcy court has jurisdiction to resolve the dispute, enforcement of the collective bargaining agreement is not foreclosed and application of the automatic stay does not permit a debtor unilaterally to alter its collective bargaining agreement.

We are not persuaded by ALPA's fear that the automatic stay may be interpreted to stay all proceedings against the debtor, even those commenced in the bankruptcy court. *E.g.*, *In re Coastal Group, Inc.*, 100 B.R. 177, 178 (Bankr. D. Del. 1989) (pre-petition breach of contract claim brought as adversary proceeding subject to automatic stay); *In re Penney*, 76 B.R. 160, 161 (Bankr. N.D. Cal. 1987) (creditor cannot commence adversary proceeding against debtor in bankruptcy court for a cause of action that, if commenced in state court, would violate automatic stay); *In re Lessig Constr., Inc.*, 67 B.R. 436, 443-44 (Bankr. E.D. Pa. 1986) (automatic stay applies to bankruptcy proceedings). *But see In re Vylene Enters., Inc.*, 63 B.R. 900, 905-07 (Bankr. C.D. Cal. 1986) (automatic stay not applicable to proceedings seeking injunctive relief commenced in bankruptcy court); *In re American Spinning Mills, Inc.*, 43 B.R. 365, 367 (Bankr. E.D. Pa. 1984) ("stay implicitly does not bar a party from commencing an adversary or contested proceeding against the debtor under the caption of the bankruptcy case in the court where the petition is pending"). The only appropriate purpose that the stay promotes with respect to collective bargaining agreements is allowing the bankruptcy court to protect its jurisdiction so that it can proceed efficiently with reorganization. Therefore, § 1113(f) compels the bankruptcy court to provide relief from the stay pursuant to § 362

(d) to hear the dispute itself, to the extent that is necessary, or, in the event that the bankruptcy court determines that it is not the appropriate forum for the resolution of such a dispute, to allow the resolution of the dispute to proceed in a non-bankruptcy forum.

Moreover, the fact that the bankruptcy court may not have jurisdiction to hear every conceivable claim that might arise from the collective bargaining agreement does not invalidate our analysis. The relevant inquiry is whether the bankruptcy court has jurisdiction to hear the particular dispute at issue. If the bankruptcy court does have jurisdiction to hear a dispute, it has the power to take the necessary steps to enforce its resolution. 11 U.S.C. § 105 (1988).

Finally, our concern with a procedural mechanism by which the union can present the dispute to the bankruptcy court does not foreclose debtor-initiated resolutions of disputes. A situation in which the union could not bring the dispute before the bankruptcy court and the debtor chose not to, however, would render the collective bargaining agreement unenforceable. That result is prohibited by § 1113(f).

(B)

It follows from our preceding analysis that, if the wet-lease dispute was properly presented to the bankruptcy court, or could have been, and the bankruptcy court could exercise jurisdiction over it, application of the automatic stay was not precluded by § 1113(f). In making this determination, we need not decide whether the bankruptcy court would have jurisdiction to resolve any dispute arising from the collective bargaining agreement, but only whether it had jurisdiction to decide this particular dispute.

Initially, since Eastern brought the merits of the dispute before the bankruptcy court, we need not consider whether ALPA had a procedural mechanism with which to place the dispute before the bankruptcy court. We turn, therefore, to the jurisdiction issue.

In *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Supreme Court considered constitutional restraints on bankruptcy court jurisdiction. The plurality distinguished those issues "at the core of the federal bankruptcy power . . . from the adjudication of state-created private rights." *Id.* at 71. The bankruptcy court can exercise jurisdiction over the former, but cannot exercise jurisdiction over a state law contract claim that arose pre-petition. Such a claim can be adjudicated only in an Article III court.

In response to *Marathon*, as part of the BAFJA, Congress amended the jurisdictional grant to bankruptcy courts. Bankruptcy courts may enter "appropriate orders and judgments" in "core" proceedings. 28 U.S.C. § 157(b)(1) (1988). Congress provided a nonexclusive list of proceedings it deemed to be core. 28 U.S.C. § 157(b)(2) (1988). In addition, a bankruptcy court can hear non-core proceedings if they are related to the bankruptcy case and the bankruptcy court submits proposed findings of fact and conclusions of law for review by the district court. 28 U.S.C. § 157(c)(1) (1988).

"[B]ankruptcy jurisdiction [is] to be construed as broadly as possible within the constitutional constraints of *Marathon*." *In re Ben Cooper, Inc.*, 896 F.2d 1394, 1398 (2 Cir. 1990), *vacated on other grounds*, 59 U.S.L.W. 3357 (U.S. Nov. 13, 1990); *see also In re Chateaugay Corp.*, *supra*, 109 B.R. at 621 ("[t]he reach of bankruptcy jurisdiction encompasses all matters the outcome of which would affect the debtor or its reorganization"). With the foregoing in mind, we consider whether the wet-lease dispute is a matter concerning the administration of the estate, justifying bankruptcy jurisdiction. 28 U.S.C. § 157(b)(2)(A) (1988).

The instant dispute involves the effect of the collective bargaining agreement on a contract entered into post-petition. "Post-petition contracts with the debtor-in-possession . . . are integral to the estate administration from the date they are entered into." *In re Ben Cooper*, *supra*, 896 F.2d at 1399. Although this dispute involves

an alleged breach of the collective bargaining agreement, rather than an alleged breach of the post-petition contract, the ramifications of the dispute on the administration of the estate are of sufficient importance to justify bankruptcy court jurisdiction. *E.g.*, *Elsinore Shore Assocs.* v. *Local 54 Hotel Employees*, 820 F.2d 62, 66 (3 Cir. 1987) (determination of whether underlying cause of strike was arbitrable justifying *Boys Market* injunction against strike was matter concerning administration of the estate); *International Ass'n of Machinists and Aerospace Workers* v. *Eastern Air Lines, Inc.*, No. 90 Civ. 1204, slip op. at 3-4 (S.D.N.Y. Nov. 7, 1990) (labor dispute involving union's conduct during strike was matter concerning the adminisration of the estate).

We are aware that Congress has expressbed an intent that district courts, rather than bankruptcy courts, hear disputes that involve "consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce." 28 U.S.C. § 157(d) (1988). Our holding is not inconsistent with congressional intent as expressed in that provision, which provides for mandatory withdrawal of such cases from the bankruptcy court to the district court. It has been construed narrowly. "Withdrawal under 28 U.S.C. § 157(d) is not available merely whenever non-Bankruptcy Code federal statutes will be considered in the Bankruptcy Court proceeding, but is reserved for cases where substantial and material consideration of non-Bankruptcy Code federal statutes is necessary for the resolution of the proceeding." *In re Ionosphere Clubs, Inc*, 103 B.R. 416, 418-19 (S.D.N.Y. 1989) (footnote omitted); *see also In re White Motor Corp.*, 42 B.R. 693, 700 (N.D. Ohio 1984) ("'[t]he district court should . . . not allow a party to use this provision to require withdrawal where such laws are not material to resolution of the proceeding'" (quoting legislative history)).

Eastern's rights in this dispute are governed by *Florida East Coast, supra.* In that case, the Court held that,

during a strike, a carrier could make unilateral changes in a collective bargaining agreement without complying with the terms of the RLA that were reasonably necessary to its continued operation. *Florida East Coast*, *supra*, 384 U.S. at 246-48. Application of that doctrine does not require the bankruptcy court to engage itself in the intricacies of the RLA. Resolution of the dispute in the instant case, therefore, does not demand substantial consideration of the RLA, but, rather "involves the routine application of [a] non-Bankruptcy Code federal statute[]." *In re Ionosphere Clubs*, *supra*, 103 B.R. at 420.

We hold that the bankruptcy court had jurisdiction to resolve the issues presented by the Florida action.

VI.

We turn next to the propriety of the bankruptcy court's exercise of its powers under § 105 to enjoin ALPA from prosecuting the wet-lease action. Eastern contends that the district court erred in holding that the bankruptcy court was precluded by § 1113(f) from issuing an injunction against prosecution of the Florida lawsuit. We agree.

Section 105(a) of the Bankruptcy Code provides that: "The court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." This power "must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington* v. *Ahlers*, 485 U.S. 197, 206 (1988); *see also In re Johns-Manville Corp.*, 801 F.2d 60, 63 (2 Cir. 1986) ("Section 105(a) . . . does not broaden the bankruptcy court's jurisdiction"). The bankruptcy court's equitable powers cannot be exercised in derogation of other sections of the Bankruptcy Code. *In re Morristown & Erie R.R. Co.*, 885 F.2d 98, 100 (3 Cir. 1989); *In re NWFX, Inc.*, 864 F.2d 593, 595 (8 Cir. 1989). The district court reasoned that an injunc-

tion issued to bar enforcement of a collective bargaining agreement outside the bankruptcy court would violate § 1113. It followed, from the district court's analysis, that the bankruptcy court's equitable powers could not be used to that end. *In re Ionosphere Clubs, supra*, 114 B.R. at 404-05.

Since § 105, like § 362, is a means by which the bankruptcy court can protect its jurisdiction, *In re Chateaugay Corp., supra*, 109 B.R. at 621, we hold that its application is not always inconsistent with § 1113. We hold that the bankruptcy court's exercise of its equitable powers pursuant to § 105 to enjoin enforcement of a collective bargaining agreement is subject to the same considerations set forth above for the application of § 362.

VII.

ALPA contends that the Norris-LaGuardia Act prohibited the bankruptcy court from enjoining the Florida action and raises several issues concerning the merits of the wet-lease decision. The district court did not reach these issues since it decided that application of the automatic stay violated § 1113(f). In light of our contrary holding, we remand the case to the district court for consideration of ALPA's claims.

VIII.

To summarize:

We hold that application of the automatic stay provisions of § 362 of the Bankruptcy Code is precluded by § 1113(f) only to the extent that they permit a debtor unilaterally to terminate or alter a collective bargaining agreement. With respect to the LPP decision, we hold that application of the automatic stay to the arbitration brought pursuant to the collective bargaining agreement violated § 1113(f) since it allowed Eastern unilaterally to avoid its obligation to arbitrate. We hold that the bankruptcy court may stay a non-bankruptcy judicial

proceeding to enforce a collective bargaining agreement if the union can bring the dispute before the bankruptcy court and the bankruptcy court has jurisdiction to resolve it. With respect to the wet-lease decision, we hold that the bankruptcy court had jurisdiction to resolve the issues raised by the Florida action and, therefore, the stay of that action was not precluded by § 1113(f). Finally, we hold that section 1113(f) did not prohibit the bankruptcy court from issuing an injunction against prosecution of the Florida action. We remand the case to the district court for further consideration of the wet-lease decision.

Affirmed in part, reversed in part and remanded.

MINER, *Circuit Judge*, concurring in part and dissenting in part:

I agree with my colleagues insofar as they conclude that application of the automatic stay provided by § 362 of the Bankruptcy Code to the arbitration of the labor protective provisions of the collective bargaining agreement is violative of § 1113(f) of the Code. I respectfully disagree with my colleagues insofar as they conclude that § 1113(f) does not bar an automatic stay of the Florida action, the injunction issued by the Bankruptcy Court against further prosecution of that action, and the Bankruptcy Court's resolution of the wet-leasing dispute.

Section 1 of the Collective Bargaining Agreement between Eastern and ALPA provides:

> that all present or future flying including flight training (except for initial factory-conducted training in newly purchased equipment), revenue flying, ferry flights, charters and wet-leases performed in or for the service of Eastern Air Lines, Inc., shall

> be performed by pilots whose names appear on the then-current Eastern Air Lines' System Seniority List.

In apparent violation of the foregoing provision, Eastern entered into wet-leasing agreements whereby it leased aircraft with crews from Continental while Eastern pilots were on strike. As a debtor in a Chapter 11 reorganization, however, Eastern may not "unilaterally . . . alter any provisions of a collective bargaining agreement" prior to court approval in the manner specified by § 1113 of the Code. 11 U.S.C. § 1113(f).

Rather than first seeking the requisite court approval authorizing rejection of the collective bargaining agreement upon a showing that modifications in the agreement "are necessary to permit the reorganization of the debtor," 11 U.S.C. § 1113(b)(1)(A), Eastern proceeded to lease aircraft and crews for its normal business operations. Eastern made no effort to negotiate with ALPA before making its arrangements with Continental. As a consequence, ALPA sought in the district court in Florida to compel expedited arbitration of its wet-leasing grievance, to procure the issuance of an injunction in aid of arbitration and to obtain other relief as well. Arbitration of the wet-leasing grievance is required by the labor agreement, which also requires arbitration of the labor protective provisions issue and of any other dispute that may arise out of the performance or nonperformance of the agreement.

My colleagues "hold that application of the automatic stay to the arbitration brought pursuant to the collective bargaining agreement violated § 1113(f) since it allowed Eastern unilaterally to avoid the obligation to arbitrate." In their opinion, this holding serves only to bar the application of the stay to the labor protective provisions arbitration proceeding. To the extent that § 1113(f) is implicated, however, it seems to me that there is no difference between rejecting the automatic stay as a bar

to that arbitration proceeding and rejecting it as a bar to an action to *compel arbitration* of the wet-leasing issue. *See In re Marine Pollution Serv., Inc.*, 88 Bankr. 588 (S.D.N.Y. 1988).

In holding the automatic stay of § 362 applicable, and in enjoining further prosecution in the Florida District Court under the authority of § 105, the Bankruptcy Court proceeded to resolve the wet-lease issue by determining that "[t]hese wet-leases were, and are, reasonably necessary to Eastern's efforts to rebuild its operations." *In re Ionosphere Clubs, Inc.*, 105 Bankr. 773, 775 (S.D.N.Y. 1989). The Bankruptcy Court also found that "[b]y proceeding to enjoin Eastern from continuing with those [wet-lease] operations, ALPA would disrupt Eastern's planned flight operations causing the estate to suffer irreparably by the substantial erosion of Eastern's operations." *Id.* While these determinations may be taken as a finding that elimination of the wet-leasing prohibition is a modification "necessary to permit the reorganization of the debtor," 11 U.S.C. § 1113 (b)(1)(A), there was no compliance with the statutory scheme for rejection of the collective bargaining agreement, and the Bankruptcy Court therefore was without jurisdiction to excuse violation of the wet-leasing prohibition clause. *See generally* Note, *Nobody Likes Rejection Unless You're a Debtor in Chapter 11: Rejection of Collective Bargaining Agreements Under 11 U.S.C. § 1113*, 34 N.Y.L. Sch. L. Rev. 169, 171-74 (1989).

By obtaining its relief in the Bankruptcy Court in the context of an action to enforce an automatic stay, Eastern is able to avoid compliance with a carefully-drawn statute enacted by Congress to govern labor-management relations in a bankruptcy reorganization. As noted by my colleagues, the statute was designed to overcome the Supreme Court's decision in *National Labor Relations Board v. Bildisco & Bildisco*, 465 U.S. 513, 528-29

(1984), which allowed a debtor unilaterally to terminate or alter a collective bargaining agreement prior to seeking bankruptcy court approval under § 365(a) for rejection of an executory contract. The statute specifically forbids termination in the manner permitted by *Bildisco* and promotes the long-established national labor policy of encouraging collective bargaining. *See In re Century Brass Prods., Inc.*, 795 F.2d 265, 266, 272 (2d Cir.), *cert. denied*, 479 S. Ct. 949 (1986).

Eastern simply cannot be relieved of its obligation to avoid wet-leasing unless it follows the step-by-step procedure established by Congress. Since it contends that the modification in employee benefits and protection it seeks is necessary to permit its reorganization, it first must make a proposal to ALPA. 11 U.S.C. § 1113(b)(1)(A). Eastern must provide ALPA with information relevant to an evaluation of the proposal. *Id.* § 1113(b)(1)(B). It must hold meetings with ALPA in a good faith effort to reach a mutually satisfactory modification. *Id.* § 1113(b)(2). It may file an application for rejection only after the modification proposal has been made, discussed and rejected. *Id.* § 1113(d)(1). The court then will decide, after a hearing on notice to interested parties, whether to reject the agreement. *Id.*

Eastern cannot prevail, even after a hearing, unless the court finds that a proposal of the sort contemplated by the statute was made prior to the hearing, ALPA has refused without good cause to accept the proposal and "the balance of the equities clearly favors rejection of [the collective bargaining] agreement." *Id.* § 1113(c). In making its decision, "the court must consider whether rejection would increase the likelihood of successful reorganization." *Truck Drivers Local 807 v. Carey Transp., Inc.*, 816 F.2d 82, 89 (2d Cir. 1987); *see also In re Royal Composing Room, Inc.*, 62 Bankr. 403 (S.D N.Y.), *aff'd*, 846 F.2d 345 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1529 (1989). It is only after all the pre-

liminary steps have been completed, and the court fails to rule on the application within thirty days after the hearing is commenced, that the debtor unilaterally "may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application." 11 U.S.C. § 1113(d)(2). Eastern took this one-sided action without bothering with the preliminaries. *See In re American Provision Co.*, 44 Bankr. 907, 909 (D. Minn. 1984). We should not countenance this conduct, for it precludes resolution of the wet leasing dispute through the preferred process of collective bargaining.

I have no quarrel with the notion that the Bankruptcy Court has jurisdiction to perform the court functions described in § 1113. That jurisdiction was not invoked here, however, and there was accordingly an evasion of congressional purpose. My colleagues say that if a collective bargaining agreement can somehow be enforced in a bankruptcy court, then the automatic stay provisions of § 362 may be applied to enforcement of the agreement in a non-bankruptcy court; that the wet-leasing dispute properly was placed before the Bankruptcy Court here; and that the Bankruptcy Court's exercise of its equitable powers under § 105 to enjoin enforcement of the collective bargaining agreement is a means that may be used for the protection of bankruptcy court jurisdiction. I say that application of the automatic stay provisions of § 362 to an action brought to compel compliance with the arbitration provisions of a collective bargaining agreement is inconsistent with the broad purposes and specific language of § 1113; that the wet-leasing dispute was not properly placed before the Bankruptcy Court here; and that the equitable powers of a bankruptcy court under § 105 may not be used to enjoin enforcement of a collective bargaining agreement in any manner inconsistent with § 1113. Accordingly, I would affirm the judgment of the district court in all respects.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of December one thousand nine hundred and ninety.

Present: HON. ROGER J. MINER, C.J.
HON. WILLIAM H. TIMBERS, C.J.
HON. JOHN E. SPRIZZO, D.J.*
Circuit Judges,

90-5033, 90-5035

IN RE: IONOSPHERE CLUBS, INC. and
EASTERN AIRLINES, INC.,
Debtors.

MARTIN R. SHUGRUE, JR., AS CHAPTER 11
TRUSTEE FOR EASTERN AIRLINES, INC.,
Appellant,

-v.-

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Appellee.

Appeal from the United States District Court
for the Southern District of New York

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* Hon. John E. Sprizzo, US District Judge for the Southern District of New York, sitting by designation.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Order of said District Court be and it hereby is affirmed in part. reversed in part and remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

ELAINE B. GOLDSMITH
Clerk

By /s/ Edward J. Guardaro
EDWARD J. GUARDARO
Deputy Clerk

Issued as Mandate. Jan. 11, 1991

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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89 Civ. 6989 (RWS)
89 Civ. 7563 (RWS)

IN RE IONOSPHERE CLUBS, INC. and
EASTERN AIR LINES, INC.,
Debtors.

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,
Appellant,

—against—

EASTERN AIR LINES, INC.,
Appellee.

OPINION

Sweet, D.J.

The Air Line Pilots Association, International ("ALPA") has appealed from two decisions of the Bankruptcy Court. The first decision denied its application for relief from the automatic stay to permit it, and to require respondent Eastern Airlines, Inc. ("Eastern"), to submit to arbitration a dispute over whether there has been a merger of the operations or facilities of Eastern and Continental Air Lines Inc ("Continental"). A finding that such a merger has occurred would trigger labor protective provisions, including certain seniority rights, contained in the collective bargaining agreement between ALPA and Eastern.

The second decision, made upon Eastern's application, enjoins ALPA from proceeding with a lawsuit initiated

in the federal court in the Southern District of Florida. ALPA alleged in that action that certain leases of aircrafts, complete with crews, that Eastern had entered into with Continental (the "wet-leases") violated the collective bargaining agreement between it and Eastern. ALPA sought by the lawsuit to enjoin Eastern from continuing with "wet-leasing."

Both appeals present for resolution whether the Bankruptcy Code's automatic stay provision governs proceedings brought against a debtor-in-possession to enforce a collective bargaining agreement where the debtor has yet to obtain or seek an order under section 1113 of the Bankruptcy Code altering or relieving it of its obligations under such agreement. The conclusion, as set out below, is that enforcement of the stay under the circumstances here would circumvent the procedures implemented by Congress when it passed section 1113. Therefore, the orders of the Bankruptcy Court are reversed.

The Parties

ALPA is an unincorporated labor organization and the authorized collective bargaining representative under the Railway Labor Act ("RLA"), 45 U.S.C. section 151 *et seq.*, for all airline pilots (captains, first officers, and second officers) employed by Eastern. ALPA represents the Eastern pilot group through a coordinating council known as the Eastern Master Executive Council ("MEC").

Eastern is a corporation engaged in the business of providing air transportation service in interstate and foreign commerce and is a "carrier" subject to the RLA, 45 U.S.C. section 151, First. Eastern's principal place of business and its corporate headquarters are located in Miami, Florida. Its common stock is owned by Texas Air Corporation ("Texas Air"), which directs, controls, and manages the operations of Eastern and also those of Continental Air Lines, Inc. ("Continental"). Frank

Lorenzo is Chairman of the Board of Directors for Texas Air, Eastern and Continental. Texas Air, in turn, is controlled by Jet Capital Corporation ("Jet Capital"). Lorenzo owns approximately 50.7% of the stock of Jet Capital and is its controlling stockholder.

The Official Committee of Unsecured Creditors (the "Committee") consists of numerous creditors of Eastern who have filed claims in the Chapter 11 proceeding, including ALPA. The Committee opposes ALPA's appeal.

The Appeals

In *In re Ionosphere Clubs, Inc.*, No. 89 B. 10448 (BRL) (Bankr. S.D.N.Y. September 11, 1989) (*"Ionosphere I"*), the Honorable Burton R. Lifland determined that the automatic stay of the Bankruptcy Code, 11 U.S.C. § 362, should not be lifted to permit ALPA to arbitrate, under either the auspices of the National Mediation Board or the System Board of Adjustment, a dispute over the interpretation and application of the labor protective provisions embodied in ALPA's and Eastern's collective bargaining agreement. ALPA appealed that decision, and argument was heard on December 8, 1989. Post-argument submissions occasioned by a decision of this court issued on January 24, 1990, were made by the parties in late January and early February, 1990.

In *Eastern Air Lines Inc. v. Airlines Pilots Association, International*, No. 89-6143A (BRL) (Bankr. S.D.N.Y. October 4, 1989) (*"Ionosphere II"*), Judge Lifland determined that the automatic stay barred ALPA from proceeding with a lawsuit it had filed in federal court in Florida against Eastern, by which ALPA sought to enjoin Eastern from engaging in the practice of wet-leasing. ALPA contended in that suit that Eastern's wet-leasing violated the terms of the collective bargaining agreement and the Railway Labor Act. Judge Lifland granted Eastern's application to enjoin ALPA from pros-

ecuting the action. ALPA appealed that decision and, following extensive briefing, argument was heard on March 16, 1990.

This court has jurisdiction over these appeals under 28 U.S.C. § 158(a).

Factual Background to the Appeals

A. *The Contractual Relationship Between the Parties*

Eastern and ALPA, as authorized representatives of the Eastern pilots, have for several years been parties to collective bargaining agreements governing the terms and conditions of pilot employment at Eastern. By letter of agreement dated March 20, 1982, ALPA, and Eastern established a System Board of Adjustment ("System Board") of four members, two company members and two union members, to determine disputes arising under their labor contracts. The operation of such boards is contemplated under Title II of the Railway Labor Act ("RLA"), 45 U.S.C. § 184. Under the terms of the arrangement, in the event that the four members of the System Board are unable to reach agreement within 30 days from the final submission of a grievance, either party may notify the System Board that a fifth member of the System Board is desired. The System Board thereupon selects a neutral from the panel of arbitrators (agreed to by both the parties) listed in the System Board Agreement. The selected neutral acts as the Chairman of the five member Board. A decision by a majority of the five member System Board is final and binding on both parties. In accordance with the RLA, the Letter Agreement provided that the System Board would have jurisdiction to resolve all disputes "growing out of grievances or out of interpretation or application of any of the terms of the Pilots' Agreement."

In 1986, Eastern and ALPA became parties to a new collective bargaining agreement dated February 23, 1986

(the "Eastern/ALPA Agreement" or "Agreement"). That Agreement was reached in the early morning hours of February 24, 1986, after months of intensive negotiations, during which Eastern was simultaneously bargaining with the International Association of Machinists ("IAM") and, against the possibility the labor talks would not result in favorable terms, negotiating terms of acquisition with Texas Air. In its entirety, the Eastern/ALPA Agreement that was concluded consisted of four handwritten pages. In addition to the phrases representing new areas of agreement, the handwritten pages incorporated by reference the parties' expired agreement.

Although able to reach this Agreement with ALPA, Eastern was unable to come to terms with the IAM, settlement with which Eastern concluded was essential to its survival in its then existing form. Eastern thereafter was acquired by Texas Air.

Eastern and ALPA negotiators reconvened several days after concluding that labor contract in an effort to expand the cryptic references in the Agreement to encompass all material terms of the new areas addressed. The parties were unable to agree on the material terms of six phrases, one of which was the provision phrase which referred to Labor Protective Provisions ("LPPs"). That provision, in its entirety, read: "LPP's & Takeover: Similar to TWA—need to work out between EAL/ALPA legal counsel."

B. *The LPP Grievance, the Strike and the Bankruptcy Filing*

On August 6, 1986 ALPA filed a grievance in connection with the disagreement over the LPP provision and submitted the grievance to the System Board on September 5, 1986. This grievance was designated as Eastern/ALPA System Board of Adjustment Arbitration Case No. 1-86 ("Arbitration Case No. 1-86"). Three months prior to then, on June 10, 1986, Eastern had filed suit in

the Southern District of Florida to compel ALPA to resume bargaining on the LPP provision rather than arbitrate. After substantial litigation between Eastern and ALPA regarding the enforceability of the Eastern/ALPA Agreement, Eastern and ALPA were directed to submit the LPP controversy to arbitration. *Eastern Air Lines Inc. v. ALPA*, 670 F. Supp. 947 (S.D.Fla. 1987), *aff'd*, 861 F.2d 1546 (11th Cir. 1988). In accordance with that determination, the grievance was submitted to the System Board. Arbitrator Frank Elkouri (the "Arbitrator"), a well-known expert in the field and the author of *How Arbitration Works*, was appointed as the fifth Board member and chairperson.

On April 19, 1988 hearings began on Arbitration Case No. 1-86. The purpose of that arbitration was to have the System Board define for the parties the precise terms of the labor protective provisions ("LPPs"). Eight days of hearings and substantial post-arbitration briefs spread over eight months. On February 7, 1989 by executive session of the System Board, it was agreed that the Arbitrator would proceed to prepare a proposed decision, following distribution of which the other Board members would have two weeks to review and, if desired, to request another executive session at which to modify or finalize the decision.

On March 4, 1989 Eastern's aircraft mechanics and ground service workers represented by IAM began a primary strike. ALPA agreed that its members would honor the IAM picket lines and strike Eastern in sympathy with the IAM. That same day, Arbitrator Elkouri mailed out his proposed decision to the members of the System Board.

On March 9, 1989, Eastern filed a petition in the Bankruptcy Court for this District under Chapter 11 of the Bankruptcy Code. The prior day, March 8, 1989, Arbitrator Elkouri issued a signed decision in Arbitration Case No. 1-86, which, contrary to the previously agreed

upon procedure, became the Board's majority decision the next day upon being signed by the two ALPA System Board members. In the decision, as forecasted by his draft opinion, the Arbitrator concluded that the parties' cryptic language evinced an agreement to incorporate into their collective bargaining agreement sections 2(a), 3 and 13 of the LPPs applied to airline employees by the Civil Aeronautics Board ("CAB") in the Allegheny-Mohawk airline merger in 1972. *See Allegheny Mohawk Merger*, 59 C.A.B. 22 (1972).

Pursuant to this decision, in March 1989 ALPA requested that Lorenzo meet with the pilots to discuss integration of the Eastern and Continental seniority lists. ALPA asserted such integration was required under sections 2(a) and 3 of the LPPs, which provides that if Eastern and Continental "unify, consolidate, merge or pool in whole or in part their separate airline facilities or any of the operations or services previously performed by them" in a manner affecting the seniority rights of pilots, "provisions shall be made for the integration of seniority lists in a fair and equitable manner." The LPPs further provide in section 13 that any dispute arising

> [w]ith respect to the protections provided herein, which cannot be settled by the parties within 20 days after the controversy arises, [] may be referred by any party to an arbitrator selected from a panel of seven names furnished by the National Mediation Board for consideration and determination. . . . Expedited hearings and decisions wil be expected and a decision shall be rendered within 90 days after the controversy arises. . . .

ALPA contended that by virtue of a number of asset transactions, Eastern had merged certain of its operations and or facilities with Continental within the meaning of section 2(a) of the LPPs. When Lorenzo and Eastern denied ALPA's request to discuss integration of

the seniority list under the LPPs, ALPA requested that the grievance be submitted to arbitration pursuant to section 13 of the LPPs. Eastern also declined that request.

C. *The LPP Proceedings Before the Bankruptcy Court*

On July 21, 1989, ALPA sought the entry of an order by the Bankruptcy Court declaring that the automatic stay provided by Bankruptcy Code section 362(a) did not apply to Arbitrator Elkouri's decision in Arbitration Case No. 1-86, because the decision had been finalized prior to the bankruptcy filing, or alternatively, for relief from the automatic stay to allow the System Board to complete its proceedings in Arbitration Case No. 1-86 by formally issuing the Elkouri decision. Eastern and the Committee did not oppose the lifting of the stay for the limited purpose of finalizing Elkouri's decision.

ALPA simultaneously sought relief from the automatic stay to commence a new arbitration proceeding to "implement" the Elkouri decision, a request which Eastern and the Committee did oppose, and, as noted, which Eastern previously had rejected. The purpose of the proposed arbitration, ALPA indicated, was to determine whether the acquisition of Eastern by Texas Air, and the occurrence of various pre-petition "asset transactions" among Texas Air, Eastern and Continental, constituted a "merger," as that term is defined in section 2(a) of the LPPs, so as to trigger the LPPs. If so, ALPA contended it would be entitled to damages, and more significantly, to the merger or "integration" of the pilot workforces of Continental and Eastern. The Bankruptcy Court, after briefing, held a hearing on August 14 on ALPA's motion to lift the automatic stay.

On September 11, 1989, the Bankruptcy Court issued its decision holding that ALPA "failed to show cause or special circumstances" as required by section 362(d)(1)

warranting relief from the automatic stay, except to permit formal entry of the Elkouri award. *Ionosphere I*, slip op. at 13.

The Court found that permitting an extensive arbitration over whether the pre-petition transaction between Continental and Eastern triggered the contractual LPPs would "usurp the bankruptcy court's critical role in the reorganization proceedings, affect special bankruptcy interests, and thwart the goal of judicial speed and economy" necessary to rehabilitate Eastern, *id.* at 14, by alienating determination of an issue that may lie at "the very heart" of Eastern's reorganization effort. *Id.* at 15.

The Bankruptcy Court found that the same asset transactions were the subject of the ongoing investigation by an independent examiner and had already been the subject of the National Mediation Board's investigation in the pending (and, according to the Court, stayed) single carrier proceeding.[1] *Id.* The Bankruptcy Court also specifically found that the new arbitration proceeding would require "great expenses" of money and time, and might result, contrary to ALPA's assurances, in a "substantial monetary award." *Id.* at 16. The Court concluded that the potential for substantial prejudice to the debtor's estate militated against granting the relief sought by ~~A~~ALPA.

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[1] On March ~~14, 1989~~, ALPA had filed a motion pursuant to Bankruptcy Code Section 1104(a) seeking the appointment of a Chapter 11 operating trustee. In support of its motion, ALPA contended that certain pre-petition asset transactions constituted mismanagement of Eastern. In response to ALPA's allegations, and at the request of Eastern, the Bankruptcy Court appointed an independent examiner (the "Examiner"), agreed to by all parties in interest including ALPA, to conduct an investigation into ALPA's claims regarding the asset transactions, an investigation recently resulting in a substantial report to Judge Lifland after extensive review of documents and depositions. Following the issuance of that report on March 1, 1990, the parties submitted additional filings in this appeal.

Finally, the Bankruptcy Court reasoned that the expertise of a labor arbitrator was not needed. The labor arbitration mandated by the opinion of the Eleventh Circuit had culminated in the issuance of the Elkouri award, which determined the specific content of the LPPs. *Ionophere I*, slip op. at 14. The Bankruptcy Court noted that the requested second arbitration involved the "application of those terms," specifically the term "merger," to the asset transactions currently under examination by the Court. *Id.* Finding that the requested second arbitration touched on "special bankruptcy interests," the Bankruptcy Court concluded that the "special expertise of the [labor] arbitrator on the issue of whether there was a merger of Eastern and Continental is not needed." *Id.* For all these reasons, the bankruptcy Court declined to lift the automatic stay to permit the arbitration, without considering whether the terms of the existing collective bargaining agreement and the LPPs called for the grievance to be arbitrated.

D. *Related Interim Proceedings*

Outside of the Bankruptcy Court and after the Chapter 11 filing, Eastern began a lawsuit in March 1989 in the Southern District of Florida seeking a declaratory judgment validating work rule changes that expanded the number of hours pilots were permitted to fly. Eastern never pursued that action, and it was dismissed *sua sponte* on July 17, 1989.

Eastern also filed an application in the Bankruptcy Court in June to reject its labor contract with ALPA pursuant to 11 U.S.C. section 1113, but thereafter withdrew that application before any action was taken upon it. On August 11, 1989, Eastern filed another lawsuit in the Southern District of Florida, this time seeking a declaratory judgment that its permanent replacement of strikers was lawful.

ALPA, meanwhile, submitted grievances challenging several labor practices instituted by Eastern, including Eastern's extension of permanent offers to pilots who had replaced strikers, its changes in flight bidding procedures, which allegedly denied seniority rights to returning former strikers, and its leasing from other airlines of planes complete with crews. ALPA sought, and Eastern declined, to arbitrate these disputes before the System Board, as, ALPA contended, was required under the RLA and pursuant to its collective bargaining agreement with Eastern.

E. *The Wet-Leasing Lawsuit and the Injunction by the Bankruptcy Court*

On September 1, 1989, ALPA filed suit in the United States District Court for the Southern District of Florida to stop Eastern's post-petition practice of leasing planes and crews from other airlines to fly Eastern routes—the "wet leasing" lawsuit that is the subject of the second appeal. *ALPA v. Eastern*, Civ. No. 89-1823. In its complaint, ALPA alleged that Eastern began wet-leasing in August 1989 and that the wet-leasing violated the Eastern-ALPA collective bargaining agreement with the RLA. ALPA's claim was based on the "scope" clause of that agreement, which it says requires Eastern to employ ALPA represented pilots on the Eastern pilot system seniority list to perform any and all Eastern flying, and, thus, bars the practice of wet-leasing with non-Eastern pilots.[2] The complaint sought injunctive relief pursuant to the RLA prohibiting the wet-leasing or in the alternative, an injunction pending expedited arbitration be-

[2] Section 1 of the Agreement provides:

> It is agreed that all present or future flying including flight training (except for initial factory-conducted training in newly purchased equipment), revenue flying, ferry flights, charters and wet-leases performed in or for the service of Eastern Air Lines, Inc., shall be performed by pilots whose names appear on the then-current Eastern Air Lines' System Seniority List.

fore the System Board. The complaint also sought monetary relief to make whole ALPA-represented Eastern pilots.

On September 13, ALPA moved for expedited discovery from Eastern, which was granted on September 26 in an order setting a trial date of October 30 for the preliminary injunctive relief request.

On September 25, 1989, Eastern brought by order to show cause an adversary complaint and motion for preliminary injunction in the Bankruptcy Court to enjoin ALPA's lawsuit as a violation of the stay and as burdensome to the Chapter 11 estate. Judge Lifland issued a temporary restraining order enjoining ALPA from continuing the prosecution of the wet-leasing suit pending hearing in Bankruptcy Court of Eastern's preliminary injunction motion. A hearing on the motion was held and, shortly thereafter, the wet-leasing action was enjoined by the Bankruptcy Court on October 4, 1989 as a violation of the automatic stay provision of 11 U.S.C. § 362. The court also invoked its authority under 11 U.S.C. § 105 as support for the injunction, holding the lawsuit was an attempt to interfere with the Bankruptcy Court's exclusive jurisdiction over the administration and property of the estate.

Judge Lifland's opinion concluded that the purpose of the protection provided by Chapter 11 "is to give the debtor a breathing spell, an opportunity to rehabilitate its business and to enable the debtor to generate revenue." *Ionosphere II*, slip op. at 11. Relying upon the Supreme Court decision in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), the court emphasized that rehabilitation of the debtor is the "[p]aramount policy of Chapter 11, to which all other bankruptcy policies are subordinated." *Id.* at 12 (quoting *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 176-77 (Bankr. S.D.N.Y. 1989)). The court further noted that the point of the automatic stay was to "permit[] the debtor-in-possession and its management to have a breathing spell from creditors pursu-

ing their claims . . . so they may concentrate on the debtor's business and rehabilitation effort." *Id.* at 16 (citation omitted).

The court therefore held that ALPA's lawsuit to enjoin wet-leasing violated automatic stay provision section 362(a)(3), since the suit "obstructs Eastern in its rebuilding efforts by controlling the manner in which it uses its assets." *Id.* The court did not directly address ALPA's argument that the passage of section 1113 modified the automatic stay provision of the Code as applied to actions against a debtor to enforce a collective bargaining agreement, although the court acknowledged ALPA's contention that a debtor's application under section 1113 of the Code was the exclusive procedure by which a debtor could alter its collective bargaining agreement in bankruptcy. *Id.* at 17.

The Judge Lifland further ruled that the Bankruptcy Court had authority under section 105 of the Code to enjoin any proceeding which interferes with the rehabilitative process, *id.* at 14, or that impairs the court's exclusive jurisdiction over any issue that involves the administration and assets of the debtor's estate. The court therefore concluded it had exclusive jurisdiction over ALPA's complaint, and could enjoin the Florida action, since any injunction of the wet-leasing practices that issued from the federal court in Florida (presumably upon a finding there that the practice violated the collective bargaining agreement) would have a "substantial and irreparable detrimental impact on [Eastern's] reorganization." *Id.* at 18.

G. *Proceedings and Developments Subsequent to the Appeals*

Following these rulings by the Bankruptcy Court, on November 22, 1989, ALPA advised Eastern that it was ending its sympathy strike against the airline. That set in motion a number of litigation events.

Two days after notice of this turn in events, Eastern moved to amend the complaint it had filed in federal court in Florida to raise additional issues, including whether it could continue in effect work rules that allegedly deny ALPA's returning strikers their seniority rights. On December 8, 1989, ALPA sought to consolidate and expedite for hearing before the System Board the various grievances it had previously filed there, which included grievances relating to the strike replacement and work rule issues.

On December 11, 1989, ALPA notified the District Court in Florida that it consented to the filing of Eastern's proposed amended complaint in the proceeding Eastern had initiated there, and that it planned to file counterclaims that would put in issue not only Eastern's bids and hiring of permanent replacements for striking ALPA pilots, but also Eastern's alleged improper refusal to bargain with ALPA and alleged attempt to undermine ALPA's status as bargaining agent.

The same day, Eastern initiated an adversary proceeding in Bankruptcy Court placing before Judge Lifland the same issues ALPA was seeking to arbitrate before the System Board under the RLA, and which Eastern had theretofore sought to litigate in federal court in Florida. (This adversary complaint apparently did not address or seek determination of the wet-leasing issue ALPA had raised in its action filed in federal court in Florida or the LPP merger dispute ALPA had sought to arbitrate.) Eastern secured a temporary restraining order from the Bankruptcy Court halting the proposed System Board arbitration and a hearing in that court was scheduled for December 15. The next day, December 12, Eastern moved in the Southern District of Florida to withdraw its motion to amend the complaint in that Court, thereby seeking to head off ALPA's proposed counterclaims and to avoid placing the grievance and work rule issues before the Florida court.

On December 13, ALPA filed an application in this Court to withdraw Eastern's adversary proceeding from the Bankruptcy Court pursuant to the mandatory withdrawal provision, 28 U.S.C. § 157(d), and to have the proceeding transferred to the Southern District of Florida. That filing resulted in the stay of the December 15th bankruptcy court hearing. The District Court in *Eastern Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 89 Civ. 8250 (MBM) ("*Eastern Airlines*") on January 24, 1990 denied ALPA's motion to withdraw the adversary proceeding from Bankruptcy Court in a careful 26 page opinion rendered by the Honorable Michael B. Mukasey.

The Issues Presented

From this welter of prior and related proceedings three issues emerge as relevant to the determination of these appeals. Each bears on the larger question of when and in what forum collectively bargained-for rights may be enforced against an employer who has sought protection from creditors in bankruptcy.

1. Does section 362(a) of the Bankruptcy Code automatically stay actions to enforce a collective bargaining agreement, where the debtor has not sought rejection or alteration of the terms of the agreement under section 1113 of the Bankruptcy Code?

2. If section 362(a) stays such actions, did the Bankruptcy Court abuse its discretion in refusing ALPA's request for relief from the stay to arbitrate the LPP merger dispute?

3. If section 362(a) does not stay such actions, did section 105 of the Bankruptcy Code nevertheless authorize the Bankruptcy Court to enjoing the wet-leasing suit?

I. *Section 1113 Bars Application of the Automatic Stay to the Disputes over LPP Abitration and Wet-Leasing.*

A. *The Effect of Section 1113 is Properly Considered in these Appeals*

In the first proceeding, ALPA requested an order from the Bankruptcy Court lifting the automatic stay to permit it to arbitrate the rights of Eastern pilots to receive the benefit of labor protective provisions negotiated between Eastern and ALPA over three years ago (the "LPP dispute"). Failing to secure permission from the Bankruptcy Court under section 363(d) of the Code to proceed with that arbitration, ALPA now argues that the law does not require that it seek or obtain authorization from the bankruptcy court to initiate arbitration of the LPP dispute. ALPA failed to argue below, but insists on appeal, that in enacting Bankruptcy Code section 1113 in 1984, Congress effectively removed labor arbitrations and other actions to enforce rights under collective bargaining agreements from the scope of the automatic stay provision of section 362(a).

Arguments or issues not raised before a lower court ordinarily are not addressed on appeal. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). The rule has been applied to refuse consideration to arguments litigants failed to raise initially in the bankruptcy court. *See, e.g., Truck Drivers Local 807 v. Carey Transportation Inc.*, 816 F.2d 82, 90 (2d Cir. 1987) (circuit court would not consider argument in bankruptcy appeal which was not raised in either the district court or bankruptcy court); *see also In re Marvin Properties, Inc.*, 854 F.2d 1183, 1186-87 (9th Cir. 1988) (district court could properly decline to entertain issue not raised below where party offered no reason for its failure and no manifest injustice would result); *In re Ozark Restaurant Equipment Co.*, 850 F.2d 342, 345-46 (8th Cir. 1988) (district court

properly determined that it was not empowered to consider an issue not raised in the bankruptcy court); *Liakas v. Creditors' Committee of Deja Vu, Inc.*, 780 F.2d 176, 179 (1st Cir. 1986); *In re REA Holding Corp.*, 2 B.R. 733, 737 (S.D.N.Y. 1980).

Notwithstanding these authorities, appellate courts—including district courts sitting as appellate courts in bankruptcy matters—frequently do address legal arguments raised for the first time on appeal where the argument is clearly presented by the record. *See e.g., In re Air Conditioning Inc. of Stuart*, 845 F.2d 293, 299 (11th Cir.) (district court did not abuse its discretion in resolving issue presented for the first time on appeal from a bankruptcy court), *cert. denied*, — U.S. —, 109 S.Ct. 557 (1988); *Matter of Pizza of Hawaii, Inc.*, 761 F.2d 1374, 1379-80 (9th Cir. 1985) (district court has "power to consider any issue presented by the record even if the issue was not presented to the bankruptcy court"); *Abex Corp. v. Ski's Enterprises, Inc.*, 748 F.2d 513, 516 (9th Cir. 1984) ("It is well settled in this Circuit that where the new issue is purely a legal one . . . we may resolve it on appeal"); *Vintero Corp. v. Corporacion Venezolana de Fomento*, 675 F.2d 513, 515 (2d Cir. 1982) ("when a party raises new contentions that involve only questions of law, an appellate court may consider the new issues"); *North American Leisure Corp. v. A&B Duplicators, Ltd.*, 468 F.2d 695, 699 (2d Cir. 1972) (an appellate court may consider legal theories not relied upon below); *Foster v. United States*, 329 F.2d 717, 718 (2d Cir. 1964) ("[t]hese contentions are wholly different from the points raised in the court below, but since only a question of law is involved, we will proceed to consider them"); *In re Weeks, Thomas & Lysaught*, 97 B.R. 46, 46-47 (D. Kan. 1988) ("[w]hen sitting as a court of review over the bankruptcy court, the district court has power to consider any issue presented by the record, even if the issue was not presented to the bankruptcy court"); *Rubel v. Brimacombe & Schlecte, P.C.*, 86 B.R. 81, 83

(E.D. Mich. 1988) (appellee's claim that district court cannot consider legal issues not raised before the bankruptcy court is without merit).

Here, ALPA was aware of the existence of the section 1113 argument at the time of its application for relief from the stay, yet did not place the issue before the Bankruptcy Court. That failing notwithstanding, the argument presents purely legal issues that do not raise facts outside the record, and the record in that proceeding squarely presents for determination the question of section 1113's impact on the automatic stay. If ALPA is correct in its legal contention that the stay is modified by section 1113, then permission of the bankruptcy court was not necessary to proceed with the arbitration and the order foreclosing arbitration was a nullitiy. This potential injustice makes it appropriate to consider ALPA's section 1113 argument in the first appeal.

That conclusion is eased by, although reached independently of, the fact that the same legal argument is providently raised by the second appeal. In the second proceeding—brought by Eastern to prevent ALPA from continuing with its federal court action to enjoin Eastern's wet-leasing—Eastern argued to Judge Lifland that the automatic stay rendered ALPA's Florida action a nullity. ALPA's reply in the Bankruptcy Court was the same as that now asserted in the first appeal—that the automatic stay does not apply to actions to enforce rights arising under labor agreements.

Thus, in both appeals, ALPA's position rests on the proposition, endorsed in *In re Marine Pollution Services, Inc.*, 88 B.R. 588, 594-95 (S.D.N.Y.), *rev'd on other grounds*, 857 F.2d 91 (2d Cir. 1988) ("*Marine Pollution*"), that the automatic stay of section 362(a) of the Bankruptcy Code, insofar as it applies to enforcement of rights arising under labor agreements, does not survive the passage of section 1113 of the Code. That endorsement was essentially *dictum*, since the *Marine Pollution*

court already had determined that because the claim in question did not threaten to encumber property of the estate, "no interest protected" by the automatic stay was in fact implicated by the labor proceeding there in question. *Id.* at 595.

Even so, the *Marine Pollution* court's analysis cannot be lightly disregarded. The court found that in section 1113, Congress took away from debtors the statutory license to unilaterally violate their collective bargaining agreements upon the filing of a bankruptcy petition and instead required debtors to obtain the bankruptcy court's authorization prior to implementing contract modifications. It thus reasoned that

> [i]t would be anomalous to find that Congress enacted a mandatory procedure for rejecting a collective bargaining agreement without which the agreement stays in full force and effect [11 U.S.C. § 1113], and then to hold that a previously enacted section of the same statute—11 U.S.C. § 362, providing for a stay of claims against a debtor's estate—automatically invalidates the arbitration clause of a collective bargaining agreement . . . .

Id., 88 B.R. at 595. Evaluation of the soundness of that conclusion depends upon an examination of both of these sections of the Bankruptcy Code, as well as their historical relationship.

B. *The Scope and Purpose of the Automatic Stay*

Upon the filing of a petition for reorganization under Chapter 11, section 362(a) of the Bankruptcy Code operates to stay the commencement of a proceeding against the debtor that could have been commenced before the bankruptcy filing or that has as its purpose the recovery of a claim that arose prior to the bankruptcy filing. 11 U.S.C. § 362(a)(1). The section also forecloses actions, regardless of date arising, which seek to control or ob-

tain property of the debtor's estate. 11 U.S.C. § 362(a)(3). The stay is "applicable to all entities" and extends to any form of "judicial, administrative or other action or proceeding," except those exempted from its operation under § 362(b), *see* 11 U.S.C. § 362(a), or by some other provision of Title 11, *see, e.g.*, 11 U.S.C. § 1110(a), 1168(a).

The stay is intended to "give[] the debtor a breathing spell from his creditors," "permit[] the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy." S. Rep. No. 95-989, 95th Cong., 1st Sess. 54-55, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5840-5841. *See also* H. Rep. No. 95-595, 95th Cong., 1st Sess. 340-341, *reprinted in* 1978 U.S. Code Cong. & Admin. News; 5963, 6296-97; *In re Stringer*, 847 F.2d 549, 551-552 (9th Cir. 1988); *Matter of Kozak Farms, Inc.*, 47 B.R. 399, 402 (D. Mo. 1985); *In re Colin, Hochstin Co.*, 41 B.R. 322, 355 (Bkrcty. S.D.N.Y. 1984). The stay also protects creditors' interests by preserving their relative positions and preserving the remains of the debtor's estate against unsupervised dissipation through a "'chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts.'" *In re Chateugay Corp.*, 93 B.R. 26, 30 (S.D.N.Y. 1988) (quoting *Fidelity Mortgage Investors v. Camelia Builders, Inc.*, 550 F.2d 47, 55 (2d Cir. 1976), *cert. denied*, 429 U.S. 1093 (1977)). *See also* 1978 U.S. Code Cong. & Admin. News (1978) 5963, 6297 (House Report); *In re Stringer*, 847 F.2d at 551; *United States v. Sayres*, 43 B.R. 437, 439 (S.D.N.Y. 1984).

Prior to passage of section 1113, it appears that no appellate determination was made as to whether section 362 stayed actions brought to interpret, arbitrate or enforce collective bargaining agreements to which the debtor is a party, although the broad language of the stay

strongly suggests that it did.[3] Relying upon that language, several bankruptcy courts considering bankruptcy petitions filed prior to July 10, 1984 (the effective date of section 1113) so found. *E.g., In re Flechtner Packing Co.*, 63 B.R. 585, 588 (Bankr. N.D. Ohio 1986); *In re Valley Kitchens*, 58 B.R. 6, 8 (Bankr. S.D. Ohio 1985); *In re Penn Fruit Company, Inc.*, 1 B.R. 714, 716 (Bankr. E.D. Pa. 1979). Consistent with that view, labor representatives, much as other litigants, frequently sought relief in bankruptcy court from the automatic stay pursuant to section 362(d), in order to continue or commence suits or arbitrations arising under collective bargaining agreements. *See, e.g., In re Midwest Emery Freight System, Inc.*, 48 B.R. 566, 569 (Bankr. N.D. Ill. 1985); *In re Sterling Mining Co.*, 21 B.R. 66, 67 (Bankr. W.D. Va. 1982); *In re Allen & Hein, Inc.*, 59 B.R. 733, 734

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[3] *Garland Coal & Mining Co. v. United Mine Workers*, 778 F.2d 1297, 1304 (8th Cir. 1985), is a possible exception. There the court, after noting that "there is a question whether consideration of the [union's] claims [against the employer in bankruptcy] violates the automatic stay provision" and that "there was some authority for the proposition that the section 362 stay applies to labor arbitrations," assumed the stay had that effect but lifted it *sua sponte*. It then ordered the district court to issue an injunction requiring the employer to arbitrate certain labor grievances and to consider on the merits the Union's claim that other, non-arbitrable grievances constituted violations by the employer of the labor laws.

Neither of the appellate decisions cited by Eastern, *N.L.R.B. v. Superior Forwarding, Inc.*, 762 F.2d 695, 698 (8th Cir. 1985), or *Truck Drivers Local Union No. 807 v. Bohack Corp.*, 541 F.2d 312, 320 (2d Cir. 1976), *cert. denied*, 439 U.S. 825 (1978), address the effect of the automatic stay provision upon actions to enforce or arbitrate labor agreements. *Bohack* held bankruptcy court approval was required for arbitration of labor grievance under Rule 919(b) of the Bankruptcy Rules, but contained no discussion of the effect of the stay. Nor did *Superior Forwarding*, a decision which relied upon *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984) to hold that section 105 of the Bankruptcy Code permitted a bankruptcy court to enjoin the NLRB from proceeding with a hearing on unfair labor charges filed against a debtor who had filed an application with bankruptcy court to reject its collective bargaining obligations.

(Bankr. S.D. Cal. 1986); *In re Smith Jones, Inc.*, 17 B.R. 126, 127 (Bankr. D. Minn. 1981).

Thus, the generalized understanding of 11 U.S.C. section 362(a) prior to passage of 11 U.S.C. section 1113 was that it stays efforts to enforce labor agreements against debtor-signatories much as it halts efforts by other creditors to commence proceedings against the debtor. These appeals present the question as to the effect of the enactment of 11 U.S.C. section 1113 upon that received understanding.

C. *The Scope and Purpose of Section 1113*

Congress enacted 11 U.S.C. § 1113 as "an elaborate and thoroughgoing revision of the [collective bargaining agreement] rejection process." *Matter of K&B Mounting*, 50 B.R. 460, 462-63 n.3 (Bankr. N.D. Ind. 1985). This section of the Bankruptcy Code, one of several amendments to title 11 contained within the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 333 (June 29, 1984) (the "'84 Act"), sets forth in some detail the standards and procedures that govern the assumption or rejection of labor agreements by parties who have entered into bankruptcy.

(i) *Pre-Bildisco Bankruptcy Treatment of Debtor Labor Agreements*

Section 1113's impact, if any, upon the automatic stay provision of the Code requires an understanding of the legal landscape an employer in bankruptcy faced prior to the 1984 bankruptcy amendments. Before then, a debtor's decision to assume or reject a collective bargaining agreement was governed by section 365(a) of the Code. *See, e.g., Shopmen's Local Union No. 455 v. Kevin Steel Products*, 519 F.2d 698, 706 (2d Cir. 1975) (collective bargaining agreements are species of executory

contracts subject to section 365(a) rejection).[4] This Code provision addressed the general subject of a debtor's assumption, avoidance or alteration of its obligations under executory contracts, once a petition for reorganization was filed. *See generally* Countryman, *Executory Contracts in Bankruptcy: Part II*, 58 Minn. L. Rev. 479 (1974).[5]

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[4] An exception to this rule were railroad collective bargaining agreements subject to the Railway Labor Act. By express limitation set forth in Section 1167(a) of the Code, 11 U.S.C. § 1167(a), Congress provided that "[n]otwithstanding section 365 of this title, neither the court nor the trustee may change the wages or working conditions of employees of the debtor" governed by such an agreement subject to the RLA, "except in accordance with section 6 of such Act [45 U.S.C. 156]." Thus, a railroad debtor-in-possession seeking to modify or reject its labor contract was required to observe the standards and procedures set forth in the RLA, and the bankruptcy court determining whether to permit such modifications or rejection was obliged to apply the standards of section 6 of the RLA, not Section 365 of the Bankruptcy Code.

The parties do not question that this provision has no application to an airline carrier in reorganization. *See In re Air Florida System, Inc.*, 48 B.R. 440 (Bkrpty. D. Fla. 1985).

[5] Subsection 365(a) of the Code, 11 U.S.C. § 365, reads: "(a) . . . the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." The statutory language discusses the possibility of assumption as well as rejection, reflecting the fact that upon the filing of a bankruptcy petition, the debtor-in-possession could not automatically be assumed to take title to all of the debtor's prior agreements. Under Section 365(d)(2), a debtor-in-possession in chapter 11 has until a reorganization plan is confirmed to determine if it will accept or reject an executory contract. 2 *Collier on Bankruptcy* ¶ 365.03 at 365-27 (15th ed. 1989). Under the Code, this does not mean that upon filing of the petition, these contracts of the debtor are devoid of all force and effect. The Code permits the beneficiaries of such executory contracts to file administrative claims in bankruptcy court premised upon their rights under the contracts, and if the debtor-in-possession ultimately rejects such a contract, a claim of damages for breach is provided for by the Code. *Id.* at 365-20 (size of claim flowing from breach by rejection is element to be considered in applying business judgment test). But pending the debtor's assump-

Under section 365(a), a bankruptcy court could approve the debtor's rejection of ordinary business contracts in those cases where such an act would in the exercise of business judgment appear to improve the financial status of the debtor. 2 *Collier on Bankruptcy* ¶ 365.03 at 365-18 to 365-20 (15th ed. 1989). Although the statutory provision did not single out labor agreements for differential treatment, higher (and less than uniform) standards than this traditional "business judgment" test were developed in the courts to govern the rejection of labor contracts, compelled by judicial recognition of the special nature of collective bargaining agreements and the serious consequences of rejection for employees. *See In re Brada Miller Freight Systems, Inc.*, 702 F.2d 890, 899 (11th Cir. 1983) (where contract burdens the estate and equities balance in favor of rejection, agreement subject to abrogation); *Brotherhood of Railway, Airline & Steamship Clerks v. REA Express, Inc.*, 523 F.2d 164, 169 (2d Cir. 1975) (rejection permissible only where employer will otherwise collapse).

The courts also addressed the question of how to treat an employer's labor contract obligations in the period after the filing of a bankruptcy petition but before a ruling by the bankruptcy court upon the employer's application for relief from the contract under 11 U.S.C. § 365(a). One view was that these labor obligations of the debtor, like those arising under regular executory contracts, were unenforceable in this interim period, because the filing of the petition created a juridical entity—the debtor-in-possession—distinct from the employer and not bound by the employer's contracts unless and until those contractual obligations were expressly assumed by the debtor-in-possession in bankruptcy court. *See In re*

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tion or rejection, Section 365 does not authorize enforcement of such executory contracts against the unwilling debtor-in-possession, although at the request of the non-debtor party to such a contract, the court "may order the trustee to determine within a specified period of time whether to assume or reject." *Id.* at 365-30.

Bildisco, 682 F.2d 72, 78-79 (3d Cir. 1982) (relying in part upon *Kevin Steel Products*, 519 F.2d 698, 704 (2d Cir. 1975)), *aff'd on other grounds*, 465 U.S. 513 (1984). Other courts held that the filing of a petition did not relieve the employer from its general obligations arising under collective bargaining agreements or the labor laws, except to the limited extent necessary to accommodate actual conflicts between the bankruptcy and labor laws. *Truck Drivers Local Union No. 807 v. Bohack Corp.*, 541 F.2d 312, 320 (2d Cir. 1976), *cert. denied*, 439 U.S. 825 (1978).

The issues of the timing and relative ease or difficulty with which employers could free themselves from obligations imposed by their collective bargaining agreements through reorganization proceedings became subjects of increased debate, and of Congressional inquiry, after several well-publicized incidents of employer-coordinated bankruptcy filings and wage reductions. *See* Rosenberg, *Bankruptcy and the Collective Bargaining Agreement—A Brief Lesson in the Use of the Constitutional System of Checks and Balances*, 58 Am. Bankr. L. J. 293, 312 (1984). The same questions came to occupy the Supreme Court's attention in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984) ("Bildisco").

(ii) *Bildisco: Non-renforceability of Debtor's Labor Contracts*

In *Bildisco*, the Court addressed what standard would govern rejection of a labor agreement under section 365 (a), and, as well, whether a labor agreement was enforceable against the debtor once the debtor had filed its reorganization petition but prior to its court-sanctioned rejection of such an agreement. With respect to the former issue, the court unanimously held that labor contracts had characteristics sufficiently distinct from ordinary executory contracts to warrant the application of a higher standard for their renunciation pursuant to section 365(a) in bankruptcy court. *Bildisco*, 465 U.S. at

524 (majority opinion), 535 (dissent). The standard adopted, while not so high as the one enunciated by the Second Circuit in *REA Express* (that standard denied section 365(a) rejection unless an employer could demonstrate reorganization would otherwise fail), required the bankruptcy court to consider the effect of rejection upon parties other than the employer alone. All the justices concurred that section 365 of the Code permitted a bankruptcy court to approve a debtor in possession's rejection of a collective-bargaining agreement only upon a showing that the "agreement burdens the estate, and that after carful scrutiny, the equities balance in favor of rejecting the labor contract." *Id.* at 526, 535. Thus, the imputed standard was substantially more strict than the business judgment test applicable to ordinary executory contracts, the exclusive focus of which was the relative benefits of unburdening the estate. *See In re Century Brass Products, Inc.*, 795 F.2d 265, 271-72 (2d Cir.), *cert. denied*, 479 U.S. 949 (186) [sic] ("*Century Brass Products*").

The second issue considered in *Bildisco*—whether the terms of the collective bargaining agreement could be enforced against a debtor who unilaterally alters or modifies its terms after the petition was filed but before a decision had been made as to contract rejection—produced no such unanimity. The five justices composing the majority reasoned that labor contracts, like other executory contracts, could not be enforced against the debtor once a bankruptcy filing had been made. The majority opinion acknowledged that the labor laws ordinarily provide protection "when contractual obligations are repudiated by the unilateral actions of a party to the collective-bargaining agreement." *Id.* at 532. In a Chapter 11, case, however, the Court explained that

> the 'modification' in the agreement has been accomplished not by the employer's unilateral action, but rather by operation of law. Since the filing of a peti-

> tion in bankruptcy under Chapter 11 makes the contract unenforceable, [NLRA] procedures have no application to the employer's unilateral rejection of an already unenforceable contract.

465 U.S. at 533.

Central to the majority's analysis in *Bildisco* was the proposition that provisions of the Bankruptcy Code (sections 365, 501 and 502, and the automatic stay, section 362(a)), rendered executory contracts, including collective labor agreements, unenforceable from the moment of the bankruptcy filing:

> Actions on claims that have been or could have been brought before the filing of a bankruptcy petition are, with limited exceptions not relevant here, stayed through the automatic stay provisions of the Bankruptcy Code. 11 U.S.C. § 362(a) (1982 ed.). The Bankruptcy Code specifies that the rejection of an executory contract which had not been assumed constitutes a breach of the contract which relates back to the date immediately preceding the filing of a petition in bankruptcy. 11 U.S.C. § 365(g)(1) (1982 ed.). Consequently, claims arising after filing, such as result from the rejection of an executory contract, must also be presented through the normal administration process by which claims are estimated and classified. See 11 U.S.C. § 502(g) (1982 ed); *In re R. Hoe & Co.*, 508 F.2d 1126, 1132 (CA 2 1974); *Workman v. Harrison*, 282 F.2d 693, 699 (CA 10 1960). *Thus suit may not be brought against the debtor-in-possession under the collective-bargaining agreement; recovery may be had only through administration of the claim in bankruptcy.*

465 U.S. at 529-530 (footnotes omitted; emphasis supplied).[6]

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[6] The majority's reliance on these provisions took the place of the lower court's judicial entity approach. *See In re Bildisco*, 682 F.2d

That did not mean that an employer who ceased to abide by the terms of the agreement upon making a filing was forever insulated from those terms. Within the bankruptcy court, the employees might file monetary claims arising from the breach of the terms of the labor agreement (including, the majority noted, "unliquidated losses attributable to fringe benefits or security provisions like seniority rights"). *Id.* at 530 & n.12. However, the *Bildisco* majority left no doubt that the employer who filed for bankruptcy would not be required to defend against actions that sought to enforce the existing agreement, even prior to the employer's receipt of approval from the bankruptcy court of its rejection. Enforcement in that interim period was contrary to the noted Code provisions and "the Code's overall effort to give a debtor-in-possesion some flexibility and breathing space." 465 U.S. at 532 (citation omitted).

This holding, composing Part III of the Court's opinion, resulted in the dissenting opinion of Justice Brennan, joined in by Justices White, Marshall and Blackmun. In their view, prior to court-approved rejection the labor contract remained in effect. *Bildisco*, 465 U.S. 535, 545. A debtor in possession who wished to alter the terms of an existing agreement was not, by virtue of filing a chapter 11 petition, freed from complying with provisions of the labor laws governing termination or modification of labor contracts (such as the section 8(d) provisions of the National Labor Relations Act requiring that notice of

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72, 78-79 (3d Cir. 1982). As the Court observed, 465 U.S. at 528, if the debtor in possession

> were a wholly 'new entity,' it would be unnecessary for the Bankruptcy Code to allow it to reject executory contracts, since it would not be bound by such contracts in the first place. For our purposes, it is sensible to view the debtor-in-possession as the same 'entity' which existed before the filing of the bankruptcy petition, but empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have employed absent the bankruptcy filing.

proposed modifications be given in advance and that terms of the existing contract be adhered to for at least sixty days after such notice is given). *Id.* at 541-547. Such relief came when—but not before—the debtor had complied with the statutory scheme, which required a determination from the bankruptcy court that the debtor was released from the existing agreement:

> [T]he primary goal of Chapter 11 is to enable a debtor to restructure his business so as to be able to continue operating. Unquestionably, the option to reject an executory contract is essential to this goal. But the option to violate a collective bargaining agreement before it is rejected is scarcely vital to insuring successful reorganization. For if a contract is so burdensome that even temporary adherence will seriously jeopardize the reorganization, the debtor in possession may seek the Bankruptcy Court's permission to reject that contract.

465 U.S. at 550-551 (citation omitted).

(iii) *The Provisions of Section 1113*

With this background, the changes rendered by the enactment of section 1113 take on more traceable form. As our Court of Appeals has observed, the *Bildisco* decision "sparked intense Congressional debate" concerning the tension between labor and bankruptcy law, *Century Brass Products*, 795 F.2d 265, 267 (2d Cir. 1986), "culminating within a few months in the passage of section 1113." *Truck Drivers Local 807 v. Carey Transp. Inc.*, 816 F.2d 82, 87 (2d Cir. 1987) (*"Carey Transportation"*).

First—and this much was congruent with the *Bildisco* decision—Congress confirmed by passage of section 1113 that in bankruptcy proceedings, labor contracts were not to subject to the same substantive standards for rejection that governed other contracts. The '84 Act removed col-

lective bargaining agreements from the coverage of section 365(a), which applied to debtor modification of executory contracts generally, and placed such agreements under the governance of section 1113. The courts previously had construed section 365 as governing rejection of labor agreements but had read into the law higher standards for rejection for such agreements; in section 1113, Congress incorporated and refined the higher standard that had been recognized as applicable to rejection of labor agreements in *Bildisco*. *See Carey Transportation*, 816 F.2d at 88.

Unlike section 365(a), however, section 1113 sets forth detailed procedural and substantive requirements a debtor must follow before a bankruptcy court may approve the debtor's alteration or rejection of a collective bargaining agreement. *See generally* Gibson, *The New Law on Rejection of Collective Bargaining Agreements in Chapter 11: An Analysis of 11 U.S.C. § 1113*, 58 Am. Bankr. L.J. 325, 328-345; Bernstein, S.B., *Bankruptcy Practice After the Amendments Act of 1984* at 121-135 (PEC 1984); *Matter of K. & B. Mounting, Inc.*, 50 B.R. at 462-467. The procedures include making a proposal to the authorized representative of the employees covered by such agreement, conferring in good faith over proposed modifications, and providing "such relevant information as is necessary to evaluate the proposal." 11 U.S.C. § 1113 (b)(1)(A) & (B); *see also Century Brass Products*, 785 F.2d at 273.

If bargaining does not lead to agreement upon a proposal, the debtor may file a motion for rejection or modification of the existing collective bargaining agreement. As noted, the court adjudicates that motion under the standards set forth in section 1113, which include the requirements that the debtor's proposal contain only those modifications that are "necessary" for a successful reorganization, that the proposal fairly and equitably spreads the economic sacrifice, that the union rejected the pro-

proved without "good cause," and that the balance of the equities favors rejection. 11 U.S.C. § 1113(c); *see also Carey Transportation*, 816 F.2d at 88; *Century Brass Products*, 795 F.2d at 273.

Finally, section 1113 provides in two different subsections that its provisions are the exclusive remedy in the Code for a debtor to modify its collective bargaining agreement. Section 1113(a) provides that a debtor may reject a collective bargaining agreement "only in accordance with the provisions of this section." Section 1113(f) states that:

> [n]o provision of [the Bankruptcy Code] shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agrement prior to compliance with the provisions of this section.

11 U.S.C. § 1113(f).

D. *Post-Bankruptcy Petition Enforcement of Collective Bargaining Agreements after Section 1113*

The above-noted requirement that a debtor "assume or reject a collective bargaining agreement *only* in accordance with the provisions of this section," 11 U.S.C. § 1113(a), and the Code's clarification that a debtor who seeks protection in bankruptcy by filing a petition does not thereby gain license under the Code "to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions" of section 1113, 11 U.S.C. § 1113(f), firmly evince Congress' determination to reverse the *Bildisco* majority's conclusion that upon filing a petition, the bankruptcy laws permitted an employer unilaterally to reject the terms of a collective bargaining agreement prior to receiving the bankruptcy court's approval.[7] Thus, courts

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[7] The Congressional rejection of unilateral modification is further emphasized by § 1113(e), which provided that a debtor might obtain

have had no difficulty discerning that "Section 1113 reversed the second part of *Bildisco*." *Century Brass Products*, 795 F.2d 265, 266, 272 (2d Cir.), *cert. denied*, 479 U.S. 949 (1986) (further stating that Congress "overrul[ed] the unilateral power to reject given the debtor in *Bildisco*); *In re Unimet Corp.*, 842 F.2d 879, 884 (6th Cir.), *cert. denied*, — U.S. —, 109 S.Ct. 81 (1988) ("section 1113 unequivocally prohibits the employer from unilaterally modifying any provision of the collective agreement"); *Marine Pollution*, 88 B.R. at 594-95. *See also* 5 *Collier on Bankruptcy*, ¶ 1114.01 at 1113-11 (15th ed. 1989):

> Section 1113(f) reversed that part of *Bildisco & Bildisco* which held that a trustee or debtor in possession was not legally bound to a collective bargaining agreement subsequent to the filing date and prior to the court determination of the application for the authority to reject such agreement. The trustee or debtor in possession must adhere to the terms of the collective bargaining agreement unless the court approves the application for rejection pursuant to section 1113(c) or grants interim relief under section 1113(e).[8]

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authorization from the bankruptcy court to implement interim changes in the collective bargaining agreement outside the timetable of § 1113(d) governing determination of an application for permanent relief, in the event such expedited changes were essential to the continuation of the debtor's business or necessary to stave off irreparable damage to the estate. Inclusion of such a provision would be pointless if it were contemplated that an employer would be permitted unilaterally to strip itself of such obligations. Also indicative of the Congressional position on the debtor's power to make immediate unilateral modifications is § 1113(d)(2), providing that if the bankruptcy court fails to rule upon an application for modification within 30 days of hearing, the debtor may *then* proceed unilaterally to institute modifications pending the court's ruling.

[8] The rather meager legislative history of Section 1113—there are no committee reports on the Act—buttresses the point. *See, e.g.*, 130 Cong. Rec. S8898 (daily ed., June 29, 1984) (remarks of Sen.

Absent compliance with the procedures for modification which applied in bankruptcy court, the legislation gives the debtor-employer no license to avoid its contractual obligations. Congress did not expressly indicate in section 1113, however, how or where such labor obligations were to be enforced when the debtor failed to honor them yet did not seek bankruptcy court approval to modify his collective bargaining agreement. It is therefore somewhat less obvious, after a bankruptcy petition has been filed, whether an employer's alleged unilateral breach of a collective bargaining agreement must be brought to the attention of the bankruptcy court in the first instance, or is subject to ordinary prosecution and resolution elsewhere, as provided for under the labor laws in the parties' private contractual orderings.

For several reasons, the better construction is that such violations need not be brought before a bankruptcy court when the debtor has not sought relief from its labor contract obligations in the manner provided for under the bankruptcy laws. The first of these is that the evolution and purpose of section 1113 would be rendered insensible were the automatic stay construed to disable actions to enforce labor agreements brought against employers who did not avail themselves of section 1113.

By its terms Congress intended section 1113 to be the exclusive (the provision says "sole") means in the Bankruptcy Code by which a debtor could modify or reject its collective bargaining contract obligations. It is evident from the history of the events that Congress erected that requirement in response to *Bildisco*, in which several pro-

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Packwood) ("prior to compliance with the provisions of [Section 1113] . . . the labor contract is enforceable and binding on both parties . . ."); 130 Cong. Rec. S6182 (daily ed., June 4, 1984) (Senators Hatch and Packwood) (all provisions of labor agreement remain in effect until bankruptcy court approves rejection), *portions reprinted in* Appendix 3, *Collier on Bankruptcy*, XX (15th ed. 1989). *See also In re Unimet Corp.*, 842 F.2d 879, 883-884 (6th Cir. 1988) (*"Unimet"*) (recounting legislative history).

visions of the Code, including the automatic stay, were read by the Supreme Court to mean that a debtor was relieved of the duty to adhere to labor contract obligations upon the filing of the petition. *See Bildisco*, 465 U.S. 513, 529-30, 532 (majority opinion) (construing stay and other provisions as signifying that upon the "filing of the petition in bankruptcy . . . the collective bargaining agreement is no longer immediately enforceable, and may never be enforceable again"); 465 U.S. at 550 n.17 (dissenting opinion) (noting majority "find[s] significance in[] the automatic stay provision").

This historical sequence strongly favors, if it does not compel, the conclusion that Congress, by its reversal of *Bildisco*, did not wish the automatic stay to govern collective bargaining agreements. Judicial construction of the automatic stay, post-*Bildisco* and post-section 1113, so as to disable workers from commencing or continuing suits or proceedings against the debtor-in-possession arising under collective bargaining agreements (suspending all such actions temporarily and in some cases, indefinitely), would debilitate the recognized Congressional purpose of making collective bargaining agreements enforceable against debtors until and "unless the court approves the application for rejection pursuant to section 1113(c) or grants interim relief under section 1113 (e)." 5 *Collier on Bankruptcy*, § 1113.01 at 1113-11 (15th ed. 1989).

That was the basis for the decision of this court in *Marine Pollution*. Nothing presented on these appeals alters the wisdom expressed there that it would be "anomalous" to hold that the previously enacted section 362 invalidates (by rendering unenforceable) the terms of collective bargaining agreements which Congress determined in section 1113 were to "stay[] in full force and effect" until rejected or modified pursuant to that provision's procedures. *In re Marine Pollution Service*, 88 B.R. at 595; *cf. Unimet*, 842 F.2d at 884 (rejecting employer's reliance on another section of Code "to escape

its obligations" under labor agreement in view of section 1113's "unequivocal" prohibitions of unilateral modification).

That conclusion is bolstered upon consideration of a principal purpose of the automatic stay. Designed as "one of the fundamental debtor protections provided by the bankruptcy laws," the stay is intended to "give[] the debtor a breathing spell from his creditors" and "relieve[] [him] of the financial pressures that drove him into bankruptcy." S. Rep. No. 95-989, 95th Cong., 1st Sess. 54-55; H. Rep. No. 95-595 95th Cong., 1st Sess. 340-341, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5840-5841 (Senate Report), 5963, 6296-97 (House Report); *In re Stringer*, 847 F.2d 549, 551-52 (9th Cir. 1988); *In re Colin, Hochstin Co.*, 41 B.R. 322, 355 (Bankr. S.D.N.Y. 1984).

This policy of temporarily relieving the debtor, upon filing, from its obligations to creditors—well recognized in its general application—is precisely what Congress set out in section 1113 to alter in the special case of obligations owed to workers arising under collective bargaining agreements. The majority in *Bildisco* had recognized the Code's effort "to give a debtor-in-possession some flexibility and breathing space," and had concluded from its survey of the Code's provisions that Congress' "considered judgment regarding the extent to which special provisions should be afforded workers under the Bankruptcy Code" was limited largely to granting priority status to workers' unsecured claims. *Bildisco*, 465 U.S. at 529, 531 n. 12, 532. Such special provisions, the Court said, did not include "requir[ing] adherence to the terms of the collective bargaining agreement" once a petition was filed. *Id.* at 532. Congress' response, set forth in 11 U.S.C. § 1113(f), was to legislate that the contrary rule would govern labor agreements: under the Code an employer could not "unilaterally terminate or alter any provision of a collective bargaining agreement" except in accordance with the procedures of section 1113.

Thus, the very point of section 1113 was to prevent employers from using the act of a bankruptcy filing to obtain an automatic "breathing spell" from their labor obligations, although the stay promised just such a spell with respect to other obligations. When it comes to labor obligations, the employer wishing to deviate from its contracted-for duties must make an application under section 1113 to the bankruptcy court and obtain its authorization. Absent the employer's invocation of that section's procedures to govern abrogate or modify its labor obligations, labor contract enforceability is unaffected by the bankruptcy laws, including the automatic stay. That is the manner by which Congress chose to distinguish labor agreements from other executory contracts, which bankruptcy laws render unenforceable against the debtor.

Against this interpretation, Eastern urges that section 1113, although meant to further labor contract enforceability, was intended to co-exist with the automatic stay. Driving the thesis is the observation, correct insofar as it goes, that the stay, apart from offering the debtor a "breathing spell," serves the purpose of centralizing dispute resolution in bankruptcy court. Achievement of that purpose assertedly does not impair enforcement of collective bargaining rights, as contemplated by section 1113 (f)—it merely channels enforcement efforts to the bankruptcy forum.

Although the argument accommodates the competing concerns of efficient administration of reorganization proceedings and enforcement of labor rights, the proposed accommodation is not likely the one Congress meant to implement when it enacted section 1113. First, Congress did not signal in section 1113 that it intended labor disputes generally, as distinct from those concerning applications for contract modification pursuant to that section, to be adjudicated in bankruptcy court, or for there to arise in bankruptcy court a cause of action under section 1113(f) to remedy contract breaches or violations of

labor law whenever a debtor unilaterally terminates or alters a labor contract term. As structured, subsections 1113(a) to 1113(e) detail an affirmative and exclusive procedure by which the willing employer can avail itself of the bankruptcy laws to modify its collective bargaining agreement. Section 1113(f) does not forbid use of other *non*-bankruptcy avenues of altering labor obligation; rather, it eschews the employer's reliance on any other *bankruptcy* provision to insulate the employer from the ordinary legal consequences of unilaterally terminating or altering its labor agreements. In short, the statute's facial purpose and intended effect is to place before the bankruptcy forum *debtor*-initiated applications for relief from collective bargaining agreements. *Century Brass Products*, 795 F.2d at 276 (debtor is "the moving-party seeking rejection of its collective bargaining agreement" and so bears the "burden of persuasion on the procedural and substantive standards of section 1113"). Absent the debtor's request for modification, the statute reveals no purpose to channel all actions to enforce or arbitrate existing, unmodified agreements into the single forum of the bankruptcy court.[9]

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[9] Casting further doubt on this "single bankruptcy forum" theory is the fact that a bankruptcy court resolving § 1113 applications of a debtor acts in a role quite distinct from that of a court, or arbitrator, applying labor and contract law principles to interpret or enforce an existing collective bargaining agreement. When the bankruptcy court determines a debtor's request ot reject or modify a labor agreement under § 1113 of the Bankruptcy Code, it must "balance [] the equities." 11 U.S.C. § 1113 (c)(3). As the Second Circuit observed in *Century Brass Products*, 795 F.2d 265, 273 (1986), this requirement "codifies the unanimous holding" in *Bildisco* that the decisionmaker consider the likelihood and consequences of liquidation without rejection, the reduced value of creditors' claims and subsequent hardships on them, and the impact on the employees. *Id.*, at 272. In performing that task, "the Bankruptcy Court must focus on the ultimate goal of Chapter 11 . . . [of] how the equities relate to the success of the reorganization." *Bildisco*, 465 U.S. at 526, *quoted in Century Brass Products*, 795 F.2d at 272 n.4. In contrast, where a debtor-employer has not

Second, the argument is premised on the central, but questionable, notion that the bankruptcy court is necessarily available at the labor representative's asking to litigate labor disputes and to enjoin breaches of labor agreements. Unless that is universally so, the automatic stay would inhibit the legislative purpose of ensuring that filing of a bankruptcy petition does not interfere with the enforceability of collective bargaining agreements.[10] Nowhere, however, does the Code specify that the bankruptcy judge in fact is obliged to open the bankruptcy court as a forum for vindication of rights the assertion of which elsewhere has been stayed under 11 U.S.C. § 362(a).

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sought relief under the equitable standards of § 1113, it remains bound by the existing, unaltered terms of the bargaining agreement and the labor laws. *See* 11 U.S.C. § 1113(f). The question for the court or arbitrator to determine is what the contract or the labor laws require, not how the contract equitably could be modified in accord with bankruptcy law concerns. Under the Congressional scheme, considerations relevant under § 1113, such as the success of reorganization, do not lawfully govern, or bear upon, the agreement's interpretation or enforcement prior to the debtor's § 1113 application. In view of these distinct decisional frameworks, it is even less obvious that Congress would have wished to make bankruptcy courts the principal forum for resolution of labor contract enforcement matters, as distinguished from the forum for a debtor's modification of labor agreements, the process and standards for which it laid out in § 1113 of the Bankruptcy Code.

[10] By its terms, the stay takes effect upon the bankruptcy filing and continues in force until the time a bankruptcy case is closed or dismissed, 11 U.S.C. § 362(c). The stay may be lifted by the court "for cause," a discretionary determination of the court that is made only after notice and hearing and is reviewable only under the abuse of discretion standard. *See* 11 U.S.C. § 362(d) & (e); *In re Frigitemp Corp.*, 8 B.R. 284, 289 (S.D.N.Y. 1981). Suiting the stay's purpose of giving breathing space to the debtor, the provision contains no mechanism mandating removal or transfer of actions to the bankruptcy court in the event the bankruptcy court declines to allow an action to proceed elsewhere.

Despite Eastern's assurance that the stay "does not apply to actions brought in bankruptcy court," some bankruptcy courts in fact have held that it does, and have dismissed claims against a debtor brought in the bankruptcy forum that were filed without obtaining leave under section 362(d). *See, e.g., Matter of Coastal Group, Inc.*, 100 B.R. 177 (Bankr. Del. 1989); *In re Penney*, 76 B.R. 160, 161 (Bankr. N.D. Ca. 1989); *Lessig Construction, Inc. v. Schnabel Associates*, 67 B.R. 436, 443-44 (Bankr. E.D. Pa. 1986). In this last case, the stay was applied even to bar claims of setoff asserted by counterclaim against a debtor in bankruptcy court after the debtor itself had instituted an adversary proceeding in that forum. *Lessig Construction*, 67 B.R. 436, 437. *Cf. In re Bell & Beckwith*, 50 B.R. 422, 429 (Bankr. N.D. Ohio 1985) (trustee's filing of adversary action against party had "effect of relieving the stay" as to party "for the limited purpose of [party's] asserting counterclaims" which related to trustee's allegations). *See also* 4 *Collier on Bankruptcy* ¶ 553.05[2], at 533-32 to 533-33 (creditor seeking to exercise post petition setoff "must first move for relief from automatic stay").

Under Eastern's view, then, the union might not be able to enforce its rights under a labor agreement against an unwilling debtor, anywhere, without first securing the permission of the bankruptcy court.[11] That appears to be exactly the reverse of the scheme passed by Congress, which places the burden on the *employer* to seek relief from the bankruptcy court if it wishes to rely on the bankruptcy process to escape from or alter its obligations under its labor contracts. The question of law is unsettled, *see In re Vylene Enterprises, Inc.*, 63 B.R. 900, 905-07 (Bankr. C.D. Cal. 1986) (automatic stay does not apply to proceedings initiated in bankruptcy court);

[11] And if the bankruptcy court declined such permission, then the union would have no legal means by which to force the employer to live by the terms of its unmodified labor contracts.

In re American Spinning Mills, Inc., 43 B.R. 365, 367 (Bankr. E.D.Pa. 1984) (same), but the evident legal uncertainty as to the availability of the bankruptcy court as a forum in which workers automatically could obtain a hearing on claims brought to enforce labor rights forcefully undercuts the contention that Congress had understood bankruptcy courts to be the forum of first resort. Given the undisputed Congressional aim of keeping labor agreements enforceable until modified or rejected under section 1113, the potential unavailability of the bankruptcy forum for achievement of that purpose fortifies the contrary view, *viz.*, that the automatic stay does not bar proceedings outside of bankruptcy court that seek to compel the debtor to adhere to the terms of its collective bargaining agreements.

All of the reasons above support the conclusion reached in *Marine Pollution* that the automatic stay's application to labor proceedings does not survive the passage of section 1113. It is nevertheless true that in enacting section 1113, Congress did not expressly amend the automatic stay provision by adding to the list set forth at section 362(b) an exception for actions against the debtor brought by employees (or their labor representatives) arising under collective bargaining agreements. *See* 11 U.S.C. § 362(b).[12] That omission warrants attention since principles of statutory construction caution against repeals by implication.

No such implication is called for here. Congress, although it did not amend the language of section 362, effectuated the same end in the language of section 1113(f)—only there it expressed its purpose in a more thoroughgoing fashion that would prevent not only the automatic stay but any other lurking provision of Title 11 from interfering with enforcement of collective labor agreements. Section 1113(f) literally forecloses a court

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[12] Nor did Congress preface § 1113 with language specifically excepting labor arbitrations or enforcement proceedings from the scope of the automatic stay. *See* 11 U.S.C. § 1110(a), § 1168(a).

from any construction of the Bankruptcy Code, including the provisions of section 362(a) and the other sections of the Code that the majority in *Bildisco* relied upon, that would allow an employer in bankruptcy unilaterally to displace or revise its obligations under a collective bargaining agreement prior to its adherence to the provisions of section 1113. Section 1113(f) states: "*No provision of this title shall be construed to permit* a trustee to unilaterally terminate or alter any provision of a labor agreement . . . ." [13]

The automatic stay is a provision of Title 11, and, as noted, has as a purpose relieving debtors of their contractual obligations. Its application to actions or proceedings brought to enforce collective bargaining provisions has the immediate effect of permitting a debtor unilaterally to cease adhering to its collective bargaining agreement, without complying with the special bankruptcy procedures of section 1113. It therefore falls squarely within the intendment of section 1113(f), and,

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[13] The wording of § 1113 (f) ("No provision of *this* title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section") reveals that § 1113 was intended to override other provisions of Title 11, but not provisions of other laws. Thus, laws outside the Bankruptcy Code, such as the Railway Labor Act, might provide such license to implement contractual changes unilaterally. *See, e.g., Eastern Airlines*, No. 84-8520, slip op. at 20 (January 24, 1990):

> Eastern's rights here are governed by *Brotherhood of Ry. & S.S. Clerks v. Florida East Coast Ry. Co.*, 384 U.S. 238 (1966), which holds that once a union is free to strike, a carrier is also free to rely on self-help by making unilaterally those contract changes "reasonably necessary" for continued operation. 384 U.S. at 244, 247-48. . . . [N]othing in *Florida East Coast* holds that advance approval from a court must be secured. To the extent there is authority on that subject, it is to the effect that such approval is not generally necessary. *Railway Executives Ass'n v. Boston & Maine Corp.*, 639 F. Supp. 1092 (D.Me.), *modified on other grounds*, 808 F.2d 150 (1st Cir. 1986), *cert. denied*, 108 S.Ct. 102 (1987).

pursuant to the express Congressional instruction set forth therein, may not be applied to stay such actions or proceedings.

In view of the language Congress employed at section 1113(f), these appeals therefore do not present a situation calling into application the "cardinal rule . . . that repeals by implication are not favored." *Morton v. Mancari*, 417 U.S. 535, 549 (1974) (citations omitted). Under *Watt v. Alaska*, 451 U.S. 259, 266, the "actual intent of Congress," expressed directly in section 1113(f), is to modify the automatic stay as well as other provisions of the Bankruptcy Code, to the extent these Title 11 provisions had in the past or might again in the future be construed to permit an employer to avoid adherence to the terms of a collective bargaining agreement prior to abiding the procedures of section 1113.

E. *Application to the LPP Arbitration and Wet-Leasing Suit*

(i) *The LPP Arbitration*

In the case of the first appeal, Eastern's proposed construction of the automatic stay has had precisely this consequence of permitting an employer to avoid a term of its labor agreement. ALPA seeks to arbitrate a labor dispute arising under the LPP provisions of the collective bargaining agreement. The parties' collective bargaining agreement and the LPP provisions both require arbitration of disputes which arise under them. Relying on the automatic stay for protection, Eastern has declined to abide by these provisions, refusing to proceed to such an arbitration. Eastern has thereby succeeded in "unilaterally terminating" a provision of the collective bargaining agreement without relying on the provisions of section 1113—the exclusive vehicle under the Bankruptcy Code by which a debtor may terminate or alter a collective bargaining provision.

To read the stay to sanction Eastern's refusal to arbitrate thus quite literally violates section 1113(f)'s requirement that no provision of the Code be construed to permit unilateral termination or alteration "of any provisions of a collective bargaining agreement prior to compliance with the provisions" of section 1113.[14] To be sure, the "stay" of an arbitration proceeding is not necessarily a permanent proscription (stays can be lifted upon a showing of "cause"), nor a rejection, termination or alteration of the entire contract. Nevertheless, section 1113(f) speaks to the unilateral rejection or alteration of *any* of the provisions of a collective bargaining agreement, *Unimet*, 842 F.2d at 883, and the precise period in which it forbids the debtor's unilateral rejection or alteration of contract terms is the time running from the filing of the bankruptcy petition until the court's approval

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[14] The argument that the relief provided by the stay is not a consequence of a "unilateral" decision to modify or terminate a labor agreement—the explicit concern which § 1113(f) addresses—but rather, is outside the scope of the § 1113(f) override because eventuated by operation of law suffers from at least two frailties. First, the point misreads the meaning of "unilateral" as used in the legislation. In the context of § 1113, "unilateral" alterations by an employer most intelligibly refers to deviations from the terms of the collective bargaining agreement that are unapproved of by the bankruptcy court, *i.e.*, alterations that arise other than in accordance with the court-sanctioned modification procedures that Section 1113 itself outlines. Second, the argument relies upon a sense of "unilateral" exactly parallel to that employed by the majority in *Bildisco* to hold that the labor laws could not be applied to enforce a debtor's adherence to its labor contracts. *See Bildisco* at 533 ("In a Chapter 11 case . . . the 'modification' in the agreement has been accomplished not by the employer's unilateral action, but rather by operation of law. Since the filing of a petition in bankruptcy under Chapter 11 makes the contract unenforceable, § 8(d) procedures [prohibiting unilateral modifications] have no application to the employer's unilateral rejection of an already unenforceable contract.") As Congress by passing Section 1113 repudiated the notion that by operation of law, "the filing of a petition in bankruptcy under Chapter 11 makes the contract unenforceable," it would be rash to assume that the argument underpinning that holding survived enactment of the same law.

of any proposed changes in the contract under section 1113. Thus, the fact that the stay is not necessarily equivalent to a permanent change in a labor agreement in no way removes the automatic stay's operation from the scope of section 1113(f). That point is reinforced by section 1113(e), which empowers the court under emergency conditions to authorize the debtor to implement "interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement." That provision would be pointless if section 1113(f) were read to permit the debtor to deviate unilaterally, but only "temporarily," from the terms of the agreement.

Moreover, in view of the prevalence of arbitration provisions in collective bargaining agreements,[15] application of the automatic stay to allow debtors to evade arbitral terms would cause section 1113(f) to be observed most commonly in the breach. Such unsanctioned alterations in the parties' chosen forum for the vindication of their respective economic rights may not be the sort of modification or termination that Congress had first in mind when it reversed *Bildisco*'s holding approving of an employer's abrogation of its contractual obligations upon a bankruptcy filing.[16] Even if the history of section 1113

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[15] Over 95% of all collective bargaining agreements provide for arbitration. *See* J. Getman & J. Blackburn, *Labor Relations: Law, Practice and Policy* 356 (2d Ed. 1983).

[16] *Bildisco* itself involved an employer's unilateral refusal to continue making contractually-mandated fringe benefit and wage increases. 465 U.S. at 519. The dissent noted with concern other recent unilateral modifications in the economic terms of collective bargaining agreements instituted by Continental Airlines and Wilson Foods Corporation following their filing of Chapter 11 petitions which, similarly, took the concrete form of wage reductions (ranging from 40 to 50%). 465 U.S. at 549 n.16. The Congressional history also appears to focus on such substantive economic modifications. *See, e.g.* 130 Cong. Rec. S 8899 (June 29, 1984) (statement of Sen. Moynihan) (noting one airline company's use of bankruptcy filing to reduce wages by 60%).

fails to envince that its focus was to preserve arbitration as the principal means for resolution of contractual disputes involving companies in bankruptcy absent the employer's application under that section for relief from an arbitration clause, that result nevertheless is required by the express language of the statute. Prior to the debtor's adherence to the procedures set forth in section 1113 for modification, section 1113(f) grants the debtor no license to "terminate or alter *any* provisions" of a collective bargaining agreement. 11 U.S.C. 1113(f); *see also Unimet*, 842 F.2d at 883 (rejecting, in view of "any provision" language of statute, employer's argument that § 1113 does not apply to retiree benefits term of labor contract). There is no basis for withholding application of that section to permit debtors to deviate unilaterally from arbitration clauses of labor agreements, any more than any other contractual term to which they have committed themselves.[17]

(ii) *The Wet-Leasing Action*

In the case of the second appeal, the automatic stay has equally served to foreclose ALPA's enforcement of contractual provisions, and to deter Eastern's invocation of section 1113 procedures.

ALPA instituted the wet-leasing litigation in federal court in September 1989, soon after learning that East-

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[17] Engrafting such an exception upon § 1113(f) also would impair the federal policy favoring arbitration of labor disputes enunciated in the celebrated Steelworkers Trilogy. *United Steelworkers v. Warrior & Gulf Navigation*, 363 U.S. at 581-82; *see also Union Pacific R. Co. v. Sheehan*, 439 U.S. 89, 94 (1978) (RLA embodies strong policy favoring arbitration of disputes concerning interpretation of collective bargaining agreement); *Eastern Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 861 F.2d 1546, 1555 (11th Cir. 1988) (labor arbitrators have "a special competence not shared by a federal court that will enable the [arbitrator] wisely to construe language that may appear too vague to even the most intrepid of generalist judges").

ern had initiated the practice of leasing planes with crews from Continental. A preliminary injunction hearing was scheduled by the federal district court and expedited discovery was authorized. Before the hearing could be held, Eastern applied to the Bankruptcy Court here for a ruling that the automatic stay prevented ALPA from going forward with its suit, which assertedly was one to enjoin rejection by Eastern of provisions of a collective bargaining agreement. The court's ruling that the stay governed that action thus has prevented ALPA from receiving a determination on the merits of its wet-leasing enforcement claim.

So long as the automatic stay is deemed in force, ALPA cannot easily obtain an order forcing Eastern to cease wet-leasing, and Eastern has little incentive to seek relief under the standards of section 1113 from the provisions of its collective bargaining agreement, assuming those provisions actually do prohibit wet-leasing. Meanwhile, the interruption and interference worked by the stay effectively may have mooted that part of ALPA's claim which sought injunctive relief against the wet-leasing practices, which Eastern has indicated were temporary in nature and are now abating.

Neither of these outcomes could have been what Congress had in mind when it reversed *Bildisco*. The automatic stay's continued application to labor disputes is fundamentally inconsistent with its enacted policy of keeping labor contracts enforceable until modified in accordance with section 1113. Accordingly, as required by section 1113(f), section 362(a) of the Bankruptcy Code may not bar ALPA from proceeding with the wet-leasing lawsuit, nor require ALPA to obtain the Bankruptcy Court's permission under section 362(d) before commencing an arbitration with respect to the LPP merger condition.

II. *The Bankruptcy Court's Injunction of the Wet-Leasing Action Contravenes Section 105 and Section 1113 of the Bankruptcy Code.*

Section 105(a) of the Bankruptcy Code provides that a bankruptcy court "may issue any order . . . that is necessary to carry out the provisions of this title." 11 U.S.C. section 105(a). Pursuant to this provision, the Bankruptcy Court has "broad equitable powers to preserve its own jurisdiction." *In re Chateaugay Corp.*, 93 B.R. 26, 29 (S.D.N.Y. 1988). These powers include staying proceedings which otherwise remain unaffected by the automatic stay, where necessary under the provisions of Title 11 "to assure the orderly conduct of the reorganization proceedings." *In re Baldwin-United Corp. Litig.*, 765 F.2d 343, 348 (2d Cir. 1985) (citation omitted); *see also In re Neuman*, 71 B.R. 567, 573-574 (S.D.N.Y. 1987) (section 105(a) injunction against state court action unaffected by section 362 appropriate where such a "foray to [an]other forum[] to determine what is property of the estate for purposes of bankruptcy law . . . [would] disrupt the heart of the duties that the [bankruptcy] court is designed to perform"); *In re Johns-Manville Corp.*, 52 B.R. 879, 889 (Bankr. S.D.N.Y. 1985), *aff'd*, 60 B.R. 842 (S.D.N.Y.), *rev'd on other grounds*, 801 F.2d 60 (2d Cir. 1986).

Were the prospect of interference with the reorganization effort always legally sufficient to support an order under section 105, the Bankruptcy Court order here in question would appear to satisfy that standard. Judge Lifland determined below that the injunctive relief sought by Eastern was "essential" to the reorganization effort. *Ionosphere II* at 10. That determination was predicated on the court's findings that the wet leasing practices Eastern had initiated "were, and are, reasonably necessary to Eastern's efforts to rebuild its operations," *Ionosphere II* at 6, and that the injunctive relief sought by ALPA in federal district court—stopping the wet-leasing

practices as in violation of Eastern's labor contract—would, if awarded, cause "turmoil," loss in profits from wet leased operations, and "substantial erosion of Eastern's operations." *Id.* at 6-7. For these principal reasons, the court found that ALPA's lawsuit to enjoin Eastern's alleged unilateral deviation from its labor obligations interfered significantly with the reorganization proceedings and the court's jurisdiction over the administration and operation of the estate.[18]

Such a finding ordinarily will support an injunction under section 105(a) as "necessary to carry out the provisions of this title," 11 U.S.C. section 105(a), since, as the Bankruptcy Court held, rehabilitation of the debtor is a "[p]aramount policy and goal of Chapter 11." *Ionosphere II* at 12. However, section 105(a) does not permit a bankruptcy court's view of the steps appropriate or necessary to implement the policy of debtor rehabilitation to supplant or subordinate specific Congressionally-determined bankruptcy procedures or policies regulating its achievement. The court's equitable powers "must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988); *Guerin v. Weil, Gotshal & Manges*, 205 F.2d 302, 304 (2d Cir. 1953) ("exercise of [bankruptcy court's] equitable powers must be strictly confined within the prescribed limits of the Bankruptcy Act").

Thus, section 105(a) "does not empower courts to issue orders that defeat rather than carry out the explicit provisions of the Bankruptcy Code. . . ." *Sea Harvest Corp.*

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[18] The court also found that permitting the lawsuit to go forward would interfere with the bankruptcy proceeding by "burden[ing] Eastern's estate" (because defending the lawsuit would require expenditures of resources) and "divert[ing] attention from an essential task in the case," *viz.*, the filing of a plan of reorganization. *Id.* at 7-8.

v. Riviera Land Co., 868 F.2d 1077, 1080 (9th Cir. 1989). Where the Code provides a circumscribed means for a debtor (or some other party in interest) to obtain a form of relief, the Congressionally-set standards and procedure must be observed. In lieu of the debtor's satisfaction of those standards and procedures, a Bankruptcy Court may not lawfully use its equitable powers under section 105(a) to provide the same or equivalent relief, notwithstanding that such a use of its powers would facilitate the debtor's rehabilitation, aid the reorganization process, or serve some other important bankruptcy goal.

That appears to be the teaching of numerous recent decisions of the Supreme and circuit courts, and to hold otherwise would permit debtors or other parties to bypass specific, Congressionally-established bankruptcy standards. *See Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206, 209 (bankruptcy court cannot employ equitable powers to grant exception to "absolute priority" rule of section 1129, so as to enable debtor to retain equity interest in family farm; "relief from the current farm woes cannot come from a misconstruction of the applicable bankruptcy laws, but rather, only from action by Congress."); *Sea Harvest*, 868 F.2d at 1077 (where debtor failed to satisfy requirements for assumption of leasehold contained in section 365 of Code, section 105 does not provide an equitable exception operating in aid of debtor); *In re NWFX, Inc.*, 864 F.2d 593, 595-96 (8th Cir. 1989) (section 105 does not authorize bankruptcy court to permit equitable setoff when requirements for setoff set forth in section 553 of Code were not satisfied); *In re Shoreline Concrete Co.*, 831 F.2d 903, 905 (9th Cir. 1987) (error to rely on equitable powers to reduce fee amount owed by debtor under statutory fee provision of Bankruptcy Act); *Matter of Chicago, Milwaukee, St. Paul & Pacific R.R.*, 791 F.2d 524, 528 (7th Cir. 1986) (bankruptcy court cannot use its equitable

powers to disallow acceleration clause in solvent debtor's contract); *United States v. Sutton*, 786 F.2d 1305, 1307-08 (5th Cir. 1986) (no license under section 105 to authorize post-petition payments to spouse of debtor where section 502(b)(5) disallows claims for support that are unmatured on date of petition filing); *see* 2 *Collier on Bankruptcy*, ¶ 105.04 at 105-15 n.5 (15th ed. 1989) (citing additional cases).

Although none of these cases involved the particular form of equitable relief awarded below—an injunction to prevent a proceeding to enforce a labor agreement—there is no apparent basis for excusing that form of equitable relief from the general constraint recognized in section 105(a) and in these cases: that the equitable powers of the bankruptcy court be exercised in a manner consistent with, and only as necessary to carry out, the provisions of the Code. That did not occur here.

The bankruptcy court below used its equitable powers under section 105(a) to provide relief to Eastern that Congress had determined, as a matter of bankruptcy law, should be available only to debtors who have observed the procedures and satisfied the standards of section 1113. That law, as noted, requires that the employer seeking to alter its labor practice first bargain in good faith with the union, and, that effort failing, establish both that proposed changes are "necessary to permit the reorganization," and that the balance of equities "clearly favors" the debtor-proposed modifications. 11 U.S.C. § 1113(c). Eastern chose not to invoke those legislated procedures. Nor did it choose to defend in federal court in Florida its wet-leasing practices as consistent with its existing labor obligations. Instead, Eastern requested under section 105(a) that the bankruptcy court enjoin ALPA's Florida action to enforce the collective bargaining agreement, because the relief ALPA sought in Florida—an injunction against wet-leasing—would impair or prevent its reorganization under Chapter 11.

That justification is legally irrelevant to a determination under labor and contract law of the pilots' rights under the existing agreement (the adjudication which ALPA had sought in Florida), and, although highly relevant to an application under section 1113 of the Bankruptcy Code, is legally insufficient under the standards of section 1113(c) to warrant relief. Nevertheless, by proving to the satisfaction of the Bankruptcy Court that wet-leasing was "necessary" and "essential" to its reorganization, *Ionosphere II*, Factual Findings No. 15 & 35, Eastern managed to enjoin ALPA's lawsuit brought to force Eastern to adhere to its labor obligations under the collective bargaining agreement and, thereby, avoid having either to (a) defend its labor practices under its existing labor agreements and the labor laws or (b) justify modification of those practices under the standards set forth at bankruptcy law.

That relief, fashioned in effect by the Bankruptcy Court's injunction, is more expansive than that available under section 1113 of the Bankruptcy Code—yet Eastern obtained it without satisfying either that provision's procedural requirements or substantive standards. The order occasioning such relief therefore cannot fairly be said to have effectuated the provisions of the Bankruptcy Code, as required by section 105(a). To the contrary, the effect of the court's order below was to "defeat rather than carry out the explicit provisions of the Bankruptcy Code," *Sea Harvest Corp. v. Riviera Land Co.*, 868 F.2d 1077, 1080 (9th Cir. 1989), by creating from equity a bankruptcy vehicle for debtors to avoid enforcement of collective bargaining obligations other than the exclusive and precise one Congress crafted.

That the order enjoining the wet-leasing action actually disserves the specific provision of the Code that addresses the debtor's relief from collective bargaining obligations distinguishes the equitable order in this case from the injunction of state court proceedings approved of in *In re Neuman*, 71 B.R. 567 (S.D.N.Y. 1987). The

injunction there served to protect the bankruptcy court's jurisdiction over a matter that already had been addressed in the reorganization proceeding and which previously had resulted in an order of the court. As the reviewing court noted, the later-initiated state court lawsuit brought by the debtor was intended "to determine what is property of the estate for purposes of bankruptcy law" and to alter the effect of a bankruptcy court order bearing on that question that already had been issued. 71 B.R. at 573-574. Thus, the injunction of the proceedings outside of bankruptcy court, far from having the effect of permitting a debtor to bypass or evade Congressionally-specified procedures in bankruptcy for obtaining relief, furthered precisely the opposite one of preventing the debtor from evading the effect of the bankruptcy court's orders issued pursuant to the Code.

Here, by contrast, ALPA's suit in the Florida federal court was not an attempt to evade any bankruptcy order. ALPA there pursued no relief under the Bankruptcy Code, the substantive legal issues it raised had not been addressed or determined in the bankruptcy proceeding, and resolution of its suit did not require that any bankruptcy—as opposed to labor or contract—law issue be addressed or determined. This external proceeding therefore did not threaten to "disrupt the heart of the duties that the [bankruptcy] court is designed to perform," *In re Neuman*, 71 B.R. at 574, which, with respect to labor issues, Congress has defined as the hearing and determination of debtor-initiated applications presented to the court under section 1113. Eastern did not initiate such an application, declining to seek sanction under the Bankruptcy Code for its wet-leasing practices in the manner Congress contemplated. The Bankruptcy Court's finding that it was "primarily charged" with determining applications under section 1113, sound in itself, thus can not support its reaching out to stay the Florida action, given

that no section 1113 application to hear and determine was before it.[19]

The Bankruptcy Court's more general jurisdiction over the labor contract as property of the estate similarly was not in need of protection by injunction. The absence of a section 1113 filing does not appear to divest bankruptcy courts of jurisdiction over labor contract issues related to the bankruptcy proceeding, where the debtor has chosen to place such issues before it for determination by means other than a section 1113 filing, such as an adversary proceeding. Presumably, under such circumstances there could arise the need to issue a stay to prevent impairment of that jurisdiction by a subsequent-filed proceeding elsewhere. Here, however, the Bankruptcy Court had no jurisdiction over the contractual and labor law issues to protect, by injunction or otherwise, since neither ALPA or Eastern had filed an adversary complaint with that court placing those legal issues in dispute, nor otherwise sought its determination of the lawfulness of wet-leasing under either contract or labor law. *Cf., Eastern Airlines, Inc. v. Air Line Pilots Association, International, Eastern Air Line Master Executive Council*, Adv. Pro. No. 89-6590A (BRL) (ad-

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[19] Compare *In re Goodman*, 873 F.2d 598, 603 (2d Cir. 1989), which, although decided on quite different facts, also ordered that an injunction issued by the bankruptcy court be lifted to allow certain labor law questions first raised before the National Labor Relations Board to be determined there. The case, decided on primary jurisdiction grounds, did not present to the Second Circuit questions of possible evasion of § 1113, since the corporations being sued by the NLRB had long since been discharged in bankruptcy. Other cases, cited by Eastern as supporting a bankruptcy court's authority to enjoin labor contract proceedings elsewhere, all involved bankruptcy proceedings initiated prior to the passage of § 1113 and so did not consider the impact of § 1113 on the exercise of that authority. *See NLRB v. Superior Forwarding, Inc.*, 762 F.2d 695 (8th Cir. 1985); *General Athletic Products Co. v. N.L.R.B.*, 33 B.R. 1019 (S.D. Ohio 1983; *In re Unit Parts Company*, 9 B.R. 380 (Bankr. W.D. Okla. 1981).

versary proceeding initiated by Eastern in bankruptcy court in December 1989 to resolve various other labor contracts and labor law issues).

In sum, notwithstanding its conclusion that an order enjoining wet-leasing would interfere with the reorganization, the Bankruptcy Court was not authorized by section 105(a) to interfere with the issuance of such an order. The legality of the wet-leasing practice under the existing contract and labor laws had not been presented to that court by the parties, nor had Eastern presented to the Bankruptcy Court, under the only *Code* provision that supports an order of labor relief, a case for modification of the labor contract to permit wet-leasing. General title 11 policies favoring bankruptcy court oversight of the reorganization proceeding and the debtor's rehabilitation (and injunctions issued in furtherance of those general policies) must under these circumstances give way to Congress' particularized determination that labor agreements remain enforceable post-filing and that section 1113 be the exclusive vehicle under title 11 by which the debtor be relieved from obligations under those agreements. To hold otherwise would facilitate evasion of the scheme enacted by Congress.

* * * *

These holdings will, according to the findings of the Bankruptcy Court, result in disruption of the reorganization proceeding and impairment of Eastern's rehabilitation. In both of his rulings below, Judge Lifland determined that the actions ALPA has sought to proceed with elsewhere—an arbitration to determine whether the LPP merger condition has been satisfied and a lawsuit over the legality of Eastern's wet-leasing practices—presented questions whose resolution could affect the possible success or failure of Eastern's reorganization plan.

That determination resembles, and receives support from, the conclusion reached by Judge Mukasey in his

January 24, 1990 decision, *Eastern Airlines, Inc. v. Air Line Pilots Association, International, Eastern Air Line Master Executive Council*, 89 Civ. 8250 (MBM) ("Eastern Airlines"). Rejecting ALPA's contention that the Bankruptcy Court did not have *jurisdiction* under 28 U.S.C. § 157(b) over the grievances that had been placed before it by the adversary complaint of Eastern (an issue not placed in question here), Judge Mukasey remarked upon the substantial effect resolution of the grievances elsewhere would have upon the estate.

> In such circumstances, one of the advantages of arbitration when the employer is not in reorganization—finality—becomes a potentially devastating disadvantage. The only basis for review of arbitral decisions under the RLA are failure to comply with the requirements of the RLA, failure of the arbitral board to conform, or to confine itself to matters within the scope of its jurisdiction, and fraud and corruption. *Sheehan*, 439 U.S. at 93. No arbitrator can possibly be as aware as the bankruptcy judge supervising Eastern's reorganization of how that reorganization will be affected by an arbitral ruling. That presents the distinct possibility that even if ALPA prevailed at an arbitration it could find itself with an irreversible triumph over a carrier that cannot be successfully reorganized—precisely the Pyrrhic victory ALPA said at oral argument it wishes to avoid.

Eastern Airlines, slip op. at 23-24.

These legitimate concerns may call into question the wisdom, but do not undermine the lawfulness, of the Congressional determination to place upon the debtor the burden of seeking affirmative relief in bankruptcy from its obligations under collective bargaining agreements, in those circumstances where the debtor believes

its financial condition requires or warrants alteration of any of those labor obligations. Where the costs or risks of arbitration of labor disputes are so great as to truly impair a particular debtor's reoranization, the immediate resolution of that problem lies in the hands of the debtor. By availing itself of the procedures of section 1113, including the emergency provision set forth at section 1113(e) permitting interim modifications in collective bargaining agreements, the debtor may overcome impediments to reorganization those agreements pose, provided they are in fact formidable and the proposed resolution is found to be fair. The debtor-employer who refrains from seeking relief under section 1113, however, must expect to defend its labor practices under the existing terms of its collective bargaining contracts—including arbitration clauses—and the provisions of the labor laws. If it believes litigation of its more significant labor practices under the standards of the labor contract and the labor laws would best be centralized in the bankruptcy court, the debtor-employer must act to secure such determinations there, by submitting the disputes to that court in a timely fashion.

Conclusion

Because section 1113 modifies the automatic stay set forth at section 362(a), the decision of the Bankruptcy Court refusing to lift the stay to permit arbitration of the LPP dispute is vacated. Because neither section 105 (a) nor the automatic stay authorized the Bankruptcy Court to enjoin ALPA from proceeding with the wet-leasing action, the order enjoining ALPA's prosecution of that suit is reversed. In view of these determinations, is it unnecessary to consider whether the Bankruptcy Court abused its discretion in refusing to grant ALPA's application to lift the automatic stay to go forward with the LPP arbitration nor whether the Norris-La Guardia

Act bars a bankruptcy court from ever enjoining an action seeking to enforce rights under a collective bargaining agreement.

/s/ R. Sweet
ROBERT W. SWEET
U.S.D.J.

New York, N.Y.
April 9, 1990

APPENDIX D

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11 Case Nos.
89 B 10448 and
89 N 10449 (BRL)

Adversary Proceeding No. 89-6143A

IN RE: IONOSPHERE CLUBS, INC. and
EASTERN AIR LINES, INC.,
Debtors.

EASTERN AIR LINES, INC.,
Plaintiff

v.

AIRLINE PILOTS ASSOCIATION, INTERNATIONAL,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before: Hon. Burton R. Lifland, Chief Bankruptcy Judge

Upon the Complaint filed by Eastern Air Lines, Inc., as debtor-in-possession ("Eastern"), dated September 25, 1989 (the "Adversary Complaint"), requesting a finding and order that the action commenced by the Airline Pilots Association International ("ALPA"), captioned *Airline Pilots Association International v. Eastern Air Lines, Inc.*, Civil Action No. 89-1823, now pending in the United States District Court for the Southern District of Florida is a violation of the automatic stay of § 362 of the Bankruptcy Code (the "Code") and is therefore a nullity,

and should be dismissed immediately, or alternatively, an order pursuant to § 105(a) of the Code enjoining ALPA from proceeding, continuing or otherwise taking any action whatsoever in respect of the Lawsuit as against Eastern, and ordering ALPA to dismiss the Lawsuit; and based upon the record as presented at the October 2, 1989 hearing, the credible and largely uncontroverted testimony adduced at the hearing, and based upon the consent and request of the parties that the preliminary injunction hearing be consolidated with the proceeding on the merits of Eastern's Adversary Complaint for injunctive relief [1]; this Court makes the following findings of facts and conclusions of law, in accordance with Rule 52 of the Federal Rules of Civil Procedure (the "Federal Rules") made applicable herein pursuant to Bankruptcy Rule 7052.

FINDINGS OF FACT

1. On March 4, 1989, ALPA, the International Association of Machinists and Aerospace Workers ("IAM"), and Local 553, Transport Workers Union of America, AFL-CIO ("TWU"), (collectively, the "Unions"), initiated a strike against Eastern. (Adversary Complaint at ¶ 1.)

2. As a result, on March 9, 1989 (the "Petition Date"), Eastern and its affiliate, Ionosphere Clubs, Inc. ("Ionosphere"), each filed a voluntary petition for relief under Chapter 11, Title 11 of the Code. (*Id.* at ¶ 2.)

3. Since the Petition Date, Eastern and Ionosphere have continued to operate their businesses and manage their properties as debtors-in-possession pursuant to §§ 1107(a) and 1108 of the Code. (*Id.* at ¶ 3.)

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[1] The parties have stipulated that the record shall embrace all of the filed papers, pleadings and annexed exhibits relating to this adversary proceeding. (Transcript at 56.)

4. Since the Petition Date, Eastern has had to rebuild its airline in the face of the Unions' strikes. Shortly after the strike began, Eastern was flying an estimated 70 flights per day and employed approximately 1,800 employees. Currently, Eastern estimates that it offers over 600 flights per day and employs over 14,500 people. Eastern's goal is to rebuild its operations to 800 flights by the end of the year. (Transcript at 28, 30, 41; *see also*, Adversary Complaint at ¶ 4.)

5. In order for Eastern to rebuild its operations, it has been necessary to hire and train replacement pilots. (Transcript at 30-31.)

6. Because of temporary delays in graduating pilots from its training program, Eastern found it necessary to "wet lease" [leases of aircraft and crew] from Continental Air Lines, Inc. ("Continental"), a sister corporation, on a temporary short term basis in order to meet Eastern's published flight schedules. (Transcript at 30-33.)

7. In the airline industry, a "wet-lease" refers to an arrangement whereby a carrier leases aircraft and crews from another company for the purpose of performing the carrier's flying.

8. Pior to 1989, Eastern had never wet leased from another carrier.

9. Currently, Eastern has contracted for 16 wet leases involving DC-9 aircraft from Continental. Eastern plans to phase out the use of 8 of the wet leases in January, 1990 with the remaining 8 to be phased out by March 1990. Eastern currently flies approximately 80 flights per day using the wet leased aircraft which services approximately 7,000 passengers daily. (Transcript at 32-33, 35.)

10. On September 1, 1989, ALPA filed a complaint ("ALPA's Complaint") against Eastern initiating a law-

suit against Eastern which is currently pending in the United States District Court for the Southern District of Florida (the "Lawsuit")[2] to enjoin the wet-leasing arrangement. In ALPA's Complaint, ALPA alleges, *inter alia*, that Eastern's post-petition "wet leases" from Continental violate Eastern's status quo obligations under the Railway Labor Act (the "RLA"), 45 U.S.C. § 151 *et seq.*, as embodied in the 1986 collective bargaining agreement between ALPA and Eastern (the "Agreement"). (ALPA's Complaint at ¶¶ 6-9). In ALPA's Complaint, ALPA cites the terms of § 1 of the Agreement[3] and alleges that Eastern has not acted in conformity with the provisions thereof. (ALPA's Complaint at ¶¶ 10-12).

11. Additionally, on September 12, 1989, in connection with the Lawsuit, ALPA filed a request for expedited discovery. On September 13, the District Court ordered Eastern to respond to the motion to expedite discovery by September 15, 1989. After Eastern filed its opposition to expedited discovery, ALPA filed a reply on September 18, and the District Court, on September 26, granted ALPA's motion, directing that all discovery be completed by October 25, and set the matter for trial on October 30.

12. By Order To Show Cause dated September 25, 1989, Eastern moved in this Court for a determination under § 362(a) of the Code that the Lawsuit now pending is a violation of the automatic stay and is therefore

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[2] *Airline Pilots Association International v. Eastern Air Lines, Inc.*, Civil Action No. 89-1823.

[3] Section 1 of the Agreement provides:

> It is agreed that all present or future flying including flight training (except for initial factory-conducted training in newly purchased equipment), revenue flying, ferry flights, charters and wet-leases performed in or for the service of Eastern Air Lines, Inc., shall be performed by pilots whose names appear on the then-current Eastern Air Lines' System Seniority List.

a nullity, and should be dismissed and for a temporary restraining order ("TRO") pursuant to Bankruptcy Rule 7065 enjoining, staying and restraining ALPA from continuing the prosecution of the Lawsuit as against Eastern by any means until the merits of Eastern's Adversary Complaint for an injunction against ALPA are adjudicated. Alternatively, Eastern requests that this Court issue an order pursuant to § 105(a) of the Code, enjoining ALPA from proceeding, continuing or otherwise taking any action whatsoever in respect of the Lawsuit as against Eastern, and ordering ALPA to dismiss the Lawsuit.

13. This Court granted Eastern's motion for a TRO and set the matter down for the instant hearing for a preliminary injunction.

14. The injunctive relief sought by ALPA if granted would adversely affect Eastern's ability to meet flight schedules contemplated in its April, 1989 Business Plan (the "Business Plan"). (Transcript at 34-35.)

15. These wet leases were, and are, reasonably necessary to Eastern's efforts to rebuild its operations. (Transcript at 30-35.)

16. Eastern has carefully calculated to rebuild its flight schedules on a reliable basis in order to regain the confidence of the travel agencies and the flying public. (Transcript at 29.)

17. Eastern has made demonstrable progress toward substantial resumption of its operations.

18. If the wet leases were to be enjoined, turmoil would again ensue as operations from certain cities would be forced to shut down. Such an event would also have a devastating trickling effect throughout the entire system. (Transcript at 35-37.)

19. If Eastern were required to terminate the wet leases immediately, Eastern will suffer an estimated $8

million loss of profits from wet leased operations for the 4 months of September through December. (Transcript at 50.)

20. By proceeding to enjoin Eastern from continuing with those operations, ALPA would disrupt Eastern's planned flight operations causing the estate to suffer irreparably by the substantial erosion of Eastern's operations. (Transcript at 35-37.)

21. ALPA's discovery request is extremely broad and onerous and relates to the vast grouping of issues already either decided by or pending before this Court. (*See*, Adversary Complaint, Exhibit B, ALPA's Motion For Expedited Discovery In The Lawsuit.)

22. The uncontroverted testimony established that the continuation of the Lawsuit will not only burden Eastern's estate by requiring Eastern to expend substantial resources defending the Lawsuit, but will also divert attention from an essential task in the case, that is to file with this Court what will hopefully be a revised confirmable plan of reorganization.

23. The continuation of the Lawsuit and the broad expedited discovery sought in connection therewith, will place an unnecessary and undue burden on the estate.

24. ALPA is a member of the Official Creditors' Committee in these reorganization cases and routinely appears by its separate counsel taking an active position in virtually every aspect of this case.

25. ALPA has appeared before this Court and raised the issue and propriety of the wet leases *on several separate occasions* but has *never* sought relief from this Court in connection therewith.

26. ALPA's request for relief from the Florida District Court on a matter raised by itself but not pressed in this Court, is an obvious forum shopping expedition.

27. ALPA's assertion that it has commenced the Lawsuit on behalf of and to benefit its employees who desire to return to work with Eastern is disingenuous and in contradiction to ALPA's avowed strike policies which are calculated to discourage any of its members from returning to work for Eastern. Returnees are treated by ALPA with the utmost contempt and subject to disincentive sanctions.

28. ALPA has threatened retribution and dire consequences to any striking Eastern pilots who return to work for Eastern. (*See*, Adversary Complaint, Exhibit C, Eastern's Memorandum In Opposition To Motion For Expedited Discovery including attachments.) In fact, ALPA has actively sought to discipline members who have abandoned the strike demonstrating that ALPA's Lawsuit on behalf of these members is merely a pretext. *Id.* Indeed, ALPA has formed its Section 8 Committee, a group responsible for coordinating ALPA's punishment of strikebreakers for violation of ALPA's Constitution and By-Laws. *Id.*

29. ALPA's Code-A-Phone Message [4] of July 22, 1989, demonstrates the continuing efforts of ALPA to obtain the names of members who have crossed the picket-line.

> [T]he Article 8 proceedings against scabs are ongoing in the Atlanta Base. We need signed statements from pilots who have made contact with scabs, talked to the scabs and seen scabs at work. This is your chance to push people who have jeopardized your career in their own jeopardy.

(*See*, Adversary Complaint Exhibit C).

30. Among the documents requested by ALPA in the Lawsuit is a copy of the preferential recall list main-

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[4] The ALPA Code-A-Phone is a communications service that ALPA provides to its members in order to keep them updated regarding strike matters. Members access the messages, which change daily, by dialing a toll-free "800" telephone number.

tained by Eastern which contains the names of those pilots who have abandoned the strike by offering to return to Eastern. However, ALPA has stated in no uncertain terms that:

> [P]ilots who have called or gone in to have their names put on a recall list will be removed from the list of those eligible to draw strike benefit checks . . . [and] are considered to be scabs . . . . [T]he act of signing up for recall subjects every pilot doing so to the filing of Article 8 charges and the implementation of a minimum of $10,000.00 fine, even if the individual has resigned from ALPA.

See, Adversary Complaint Exhibit C, August 13, 1989, ALPA Code-A-Phone Message.

31. ALPA's discovery requests are at least partially in furtherance of its internal union disciplinary activities directed against pilots who have returned or offered to return to Eastern.

32. ALPA did not present any evidence of unredressable harm should the proposed injunction be granted.

33. Substantial resumption of Eastern's flight operations, although antithetical to the goals of the Unions is in the public interest.

34. ALPA's conduct has caused and, unless enjoined or otherwise ordered, will continue to cause, immediate, substantial and irreparable injury to Eastern and its creditor body.

35. The injunctive relief sought by Eastern is essential to its ability to rebuild its operations and to reorganize.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this core proceeding for injunctive and declaratory relief pursuant to 28 U.S.C. § 157(b)(1) and (2).

2. Pursuant to 28 U.S.C. § 1334(d), the "district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located of the debtor . . . and of property of the estate." The District Court's jurisdiction has been referred to this Court by the "Standing Order of Referral of Cases to Bankruptcy Judges." dated July 10, 1984 (Ward, Acting C.J.).

3. Bankruptcy courts have jurisdiction to "hear and determine . . . all core proceedings . . . arising in a case under title 11," 28 U.S.C. § 157(b)(1).

4. This Court's jurisdiction is further defined by § 157(b)(2)(A), which states in pertinent part as follows:

> Core proceedings include, but are not limited to
>
> > (a) matters concerning the administration of the estate.

5. The purpose of the protection provided by Chapter 11 is to give the debtor a breathing spell, an opportunity to rehabilitate its business and to enable the debtor to generate revenue. *See, In re Johns-Manville Corp.*, 801 F.2d 60, 62 (2d Cir. 1986); *In re Talladega Steaks, Inc.*, 50 Bankr. 42 (Bankr. N.D. Ala. 1985).

6. It has been recognized that the bankruptcy court has jurisdiction to hear all matters in order to expeditiously and effectively administer the estate. *See, e.g., In re Lion Capital Group*, 46 Bankr. 850, 856 (Bankr. S.D.N.Y. 1985); *In re Wood*, 825 F.2d 90, 92 (5th Cir. 1987).

7. The filing of a petition in bankruptcy creates an estate that encompasses "all legal and equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a). This provision has been broadly construed. "The scope of [§ 541(a)(1)] is broad. It includes all kinds of property, including tangible or

intangible property, causes of action . . . and all other forms of property currently specified in Section 70a of the Bankruptcy Act." *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 n.9, (1983) (quoting S. Rep. No. 989, 95th Cong., 2d Sess. 82 (1978), *reprinted in* 1978 U.S. Code Cong. Admin. News 5787, 5868).

8. "[T]he Paramount policy and goal of Chapter 11, to which all other bankruptcy policies are subordinated, is the rehabilitation of the debtor. This policy was clearly articulated by the United States Supreme Court in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984) which stated '[t]he fundamental purpose of reorganization is to prevent the debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources.'" *In re Ionosphere Clubs Inc.*, 98 Bankr. 174, 176-77 (Bankr. S.D.N.Y. 1989) (quoting *Bildisco*, 465 U.S. at 528).

9. Eastern initially sought a preliminary injunction. The traditional standards for granting a preliminary injunction pursuant to Federal Rule 65 made applicable herein pursuant to Bankruptcy Rule 7065, require the party requesting the preliminary relief to show:

> (i) a substantial likelihood that the movant will prevail on the merits;
>
> (ii) movant will suffer irreparable injury unless the injunction is issued; and
>
> (iii) the threatened injury to the movant outweighs any harm the proposed injunction may cause the opposing party.

See e.g., New York Path. & X-Ray Lab., Inc. v. Immigration & Naturalization Service, 523 F.2d 79, 81 (2d Cir. 1975); *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979) (per curiam); *In re Feit & Drexler, Inc.*, 760 F.2d 406, 415 (2d Cir. 1985); *Abdul Wali v. Coughlin*, 754 F.2d 1015 (2d Cir. 1985); *Procter*

& Gamble Co. v. Chesebrough-Pond's, Inc., 747 F.2d 114, 118 (2d Cir. 1984).

10. In cases arising under the Railway Labor Act, an additional factor of primary concern to the courts is the public interest in the continuation of service. *Long Island Ry. Co. v. IAM*, 709 F. Supp. 376, 388 (S.D.N.Y. 1989), *mod. and aff'd*, 874 F.2d 901, 910-911 (2d Cir. 1989); *Ozark Air Lines, Inc. v. Air Line Pilots Association*, 361 F. Supp. 198, 202 (E.D.Mo. 1973); *Trans International Airlines, Inc. v. International Brotherhood of Teamsters*, 650 F.2d 949, 967 (9th Cir. 1980), *cert. denied*, 449 U.S. 1110, 101 S.Ct. 918 (1981).

11. Additionally, pursuant to § 105(a) of the Code, "[t]he court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). "[T]he Bankruptcy Court has authority under § 105 broader than the automatic stay provisions of § 362 and may use its equitable powers to assure the orderly conduct of the reorganization proceedings." *LTV Steel Co., Inc. v. Board of Education of the Cleveland City School District* ("*LTV*"), 93 Bankr. 26, 29 (S.D.N.Y. 1988) (quoting *In re Baldwin-United Corp. Litig.*, 765 F.2d 343, 348 (2d Cir. 1985)); *see also, In re Johns-Manville Corp.* ("*Manville I*"), 91 Bankr. 225, 227 (Bankr. S.D.N.Y. 1988); *In re Chanticleer Associates, Ltd.*, 592 F.2d 70, 74 (2d Cir. 1979) ("The Court's power to preserve its jurisdiction by enjoining proceedings that would remove property from the bankrupts estate is fundamental to the scheme of the Bankruptcy Act").

> 12. [T]he exceptions to the automatic stay of § 362 (a) which are set forth in § 362(b) are simply exceptions to the stay which protect the estate automatically at the commencement of the case and are not limitations upon the jurisdiction of the bankruptcy court or upon its power to enjoin. The power

> is generally based upon section 105 of the Code. The court will have ample power to enjoin actions excepted from the automatic stay which might interfere in the rehabilitative process whether in a liquidation or reorganization case.

2 *Collier on Bankruptcy*, ¶ 362.05 at 362-43 (15th ed. 1988).

13. "Since injunctions in bankruptcy cases are authorized by statute, the usual equitable grounds for relief, such as irreparable damage, need not be shown." *In re Neuman*, 71 Bankr. 567, 571 (S.D.N.Y. 1987); *see, LTV*, 93 Bankr. at 29. "Instead, the bankruptcy court may 'enjoin proceedings in other courts when it is satisfied that such a proceeding would defeat or impair its jurisdiction with respect to a case before it.'" *Manville I*, 91 Bankr. at 228 (quoting *LTV*, 93 Bankr. at 29); *see also, In re Johns-Manville Corp.* (*"Manville II"*), 26 Bankr. 420, 425 (Bankr. S.D.N.Y. 1983) *aff'd*, 40 Bankr. 219 (S.D.N.Y. 1984) *rev'd in part*, 41 Bankr. 926 (S.D.N.Y. 1984). *See also, Continental Illinois National Bank v. Chicago*, 294 U.S. 648, 675, 55 S.Ct. 595, 605-06, 79 L.Ed. 1110 (1935) ("The power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction is inherent in a Court of Bankruptcy, as it is in a duly established Court of Equity."); *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1008 (4th Cir.), *cert. denied*, 479 U.S. 876, 107 S.Ct. 251, 93 L.Ed.2d 177 (1986).

14. Injunctive relief is "'an extraordinary and drastic remedy which should not be routinely granted except upon a clear showing that the movant has carried its heavy burden.'" *In re Anje Jewelry Co.*, 47 Bankr. 485, 487 (Bankr. E.D.N.Y. 1983) (quoting *United States v. State of New York*, 552 F.Supp. 255, 261 (N.D.N.Y. 1982), *aff'd*, 708 F.2d 92 (2d Cir. 1983), *cert. denied*, 466 U.S. 936 (1984)).

15. "[I]t is necessary to present strict proof of the facts and circumstances proving the likelihood of irreparable harm. Speculative and conclusory allegations are clearly insufficient." *Dore & Associates Contracting, Inc. v. American Druggists' Insur. Co.*, 54 Bankr. 353, 358 (Bankr. W.D.Wisc 1985). *See also, Manville Corp. v. Equity Security Holders Committee*, 801 F.2d 60, 68 (2d Cir. 1986).

16. Section 362(a) of the Bankruptcy Code provides in pertinent part as follows:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302 or 303 of this title . . . operates as a stay, applicable to all entities, of—
>
> > (1) the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
> >
> > * * * *
> >
> > (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.
> >
> > * * * *
> >
> > (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

17. "The automatic stay prevents creditors from reaching the assets of the debtor's estate piecemeal and preserves the debtor's estate so that all creditors and their claims can be assembled in the bankruptcy court for a single organized proceeding." *In re Ionosphere Clubs, Inc.*, No. 89 B 10448 (BRL) slip op. at 6 (Bankr.

S.D.N.Y. Aug. 2, 1989) (citing *In re Colin, Hochstin Co.*, 41 Bankr. 322, 325 (Bankr. S.D.N.Y. 1984). *See also, In re Ionosphere Clubs, Inc.*, No. 89 B 10448 (BRP) slip op. at 8 (Bankr. S.D.N.Y. September 11, 1989).

18. The automatic stay permits the debtor-in-possession and its management to have a breaching spell from creditors pursuing their claims and causes of action so they may concentrate on the debtor's business and rehabilitation effort. *Manville II*, 26 Bankr. at 425, 430.

19. Although it is not entirely clear based on the record developed as to whether the automatic stay pursuant to § 362(a)(1) and (6) is directly implicated here, ALPA's Lawsuit to enjoin the use of "wet-leasing" impedes Eastern's reorganization efforts and obstructs Eastern in its rebuilding efforts by controlling the manner in which it uses its assets, and as such, violates § 362(a)(3) of the Code.

20. This Court has previously held that § 1113 "in part overturns the Supreme Court's decision [in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984)] by forbidding unilateral rejection prior to a court hearing and ruling upon an application to reject a collective bargaining agreement." *In re Carey Transp., Inc.*, 50 Bankr. 203, 206 (Bankr. S.D.N.Y. 1985), *aff'd*, 816 F.2d 82 (2d Cir. 1987). *Accord, In re Unimet Corp.*, 842 F.2d 879, 884 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 81 (1988) ("Section 1113 unequivocally prohibits the employer from unilaterally modifying any provision of the collective bargaining agreement.")

21. Section 1113(f) of the Code, provides as follows:

> No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

22. As stated by ALPA, § 1113 of the Code has clearly been implicated here:

> Bankruptcy Code Section 1113 makes clear, on its face and as universally interpreted, that a collective bargaining agreement, and in terms of an RLA carrier, the status quo as embodied in the collective bargaining agreement, *is subject exclusively to Section 1113*. (emphasis added.)

ALPA's Memorandum of Law at 13.

23. It is clearly contemplated by the case law that the court primarily charged with the application of § 1113 in a bankruptcy case is the reorganization court wherein the case is pending. *See, In re Century Brass Products, Inc.*, 795 F.2d 265, 273 (2d. Cir. 1986), *cert. denied*, 479 U.S. 949 (1986); *Truck Drivers Local 807 v. Carey Transp., Inc.*, 816 F.2d 82, 87-88 (2d Cir. 1987).

24. Whether or not the District Court is an appropriate forum to resolve the issue of wet-leasing as it is impacted by § 1113(f) of the Code need not be decided in this instance as there would be a substantial and irrepable detrimental impact on this reorganization should another court issue an injunction under these circumstances.

25. The issues raised in ALPA's Complaint go right to the heart of a core matter involving the administration of this reorganization and is thus subject to the jurisdiction of this Court which has exclusive jurisdiction over the administration and assets of the estate. (28 U.S.C. § 157(b)(1) and (2).)

26. Pursuant to *Brotherhood of Ry. Clerks v. Florida East Coast Ry. Co.*, 384 U.S. 238 (1966), Eastern has demonstrated that the limited use of wet leasing is "truly necessary in light of the inexperience and lack of training of the new labor force or the lesser number of employees available for the continued operation" during ALPA's sympathy strike. *Id.* at 248.

27. Given the ALPA policy of retribution and sanctions leveled against any returning pilots, (*see* Findings, *supra*, at ¶¶ 27-31), the asserted purpose of the anti wet lease suit brought by ALPA to protect the interests of pilots on the "Eastern Air Lines' System Seniority List" willing to return and thereby averting any need for wet leasing is pretextual and as such constitutes a separate ground for the grant of injunctive relief.

28. Even under the irreparable harm standard of this Circuit, Eastern will suffer irreparable harm if an injunction is not granted, because money damages cannot adequately compensate for the substantial loss of business and good will which potentially will result if the Lawsuit is not enjoined.

29. At the conclusion of the hearing, both parties requested this Court to rule on the merits as to permanent relief. (Transcript at 59.) However, even in the context of preliminary relief, a likelihood of success on the merits on the part of Eastern in establishing the harm to the reorganization, the jurisdiction of this Court and the nexus between §§ 1113, 105 and even perhaps to a lesser extent 362 of the Code was established.

30. The balance of hardships tips decidedly in favor of Eastern in that it has clearly demonstrated that if ALPA is successful in its quest for injunctive relief in the Lawsuit, Eastern's operations and its business in general will be severely disrupted.

31. The threatened injury to Eastern outweighs any harm the proposed injunction may cause ALPA.

32. The injunction would not be adverse to the public interest and, in fact, it is in the public interest to allow Eastern's continuation of services in this regard.

33. Eastern's request for a permanent injunction is hereby granted.

The foregoing shall constitute this Court's findings of fact and conclusions of law.[5]

In accordance with the foregoing an Order has been simultaneously entered.

Dated: New York, New York
October 4, 1989

/s/ Burton Lifland
United States Bankruptcy Judge

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[5] Any finding that may more properly be considered a conclusion and any conclusion that may more properly be considered a finding shall be so construed.

APPENDIX E

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11 Case Nos. 89 B 10448 (BRL) and
89 B 10449 (BRL)

Adversary Proceeding No. 89-6143A

IN RE: IONOSPHERE CLUBS, INC. and
EASTERN AIR LINES, INC.,
Debtors.

EASTERN AIR LINES, INC.,
Plaintiff

v.

AIRLINE PILOTS ASSOCIATION, INTERNATIONAL,
Defendants.

ORDER

In accordance with this Court's Finding of Fact and Conclusions of Law dated October 4, 1989, it is

ORDERED that the Airline Pilots Association International ("ALPA") is hereby enjoined from proceeding, continuing or otherwise taking any action whatsoever in respect of its lawsuit captioned *Airline Pilots Association International v. Eastern Air Lines, Inc.*, Civil Action No. 89-1823, as against Eastern Air Lines, Inc. ("Eastern") now pending in the United States District Court for the Southern District of Florida (the "Lawsuit"); and it is further

ORDERED that ALPA is hereby directed to dismiss the Lawsuit forthwith.

Dated: New York, New York
October 4, 1989

/s/ Burton Lifland
United States Bankruptcy Judge

APPENDIX F

PERTINENT STATUTORY PROVISIONS

Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549:

11 U.S.C. § 105.

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

* * * *

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

11 U.S.C. § 362.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, and 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of—

* * * *

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate:

* * * *

(b) The filing of a petition under section 302, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761(4) of this title, forward contracts, or securities contracts, as defined in section 741(7) of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as

defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a) of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the

commencement of or during a case under this title to obtain possession of such property; or

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq., respectively), or under applicable State law; or

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq. respectively).

(c) Except as provided in subsections (d), (e), and (f) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

* * * *

Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 533:

11 U.S.C. § 1113.

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

(b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section, "trustee" shall include a debtor in possession), shall—

(A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which pro-

vides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and

the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the employee to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any pro-

visions of a collective bargaining agreement prior to compliance with the provisions of this section.

28 U.S.C. § 157.

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose,

as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

28 U.S.C. § 1334.

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but

not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

* * * *

Railway Labor Act, Pub. L. No. 69-257, 44 Stat. 577 as amended:

45 U.S.C. § 152.

First.

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

* * * *

Seventh.

No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

45 U.S.C. § 156.

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interseted in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with

reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

No. 90-1482

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

In re IONOSPHERE CLUBS, INC. and EASTERN AIR LINES, INC.,
Debtors.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AFL-CIO,
Petitioner,

v.

MARTIN R. SHUGRUE, JR., as CHAPTER 11 TRUSTEE for EASTERN AIR LINES, INC.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 11 U.S.C. § 1113(f) repealed the automatic stay provisions of 11 U.S.C. § 362(a) with respect to Petitioner's action to enforce a collective bargaining agreement, where such action seeks to obtain possession of or exercise control over property of the estate or impedes the reorganization case?

2. Whether Petitioner's action to enforce a collective bargaining agreement is a "core" matter within the meaning of 28 U.S.C. § 157(b), where such action concerns the administration of Eastern's estate?

3. Whether Petitioner's action seeking to enforce a collective bargaining agreement, involving the routine application of non-bankruptcy federal law, would have been subject to mandatory withdrawal to the district court, pursuant to 28 U.S.C. § 157(d), had it been originally brought in the bankruptcy court?

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No. 90-1482

IN THE

Supreme Court of the United States

October Term, 1990

In re IONOSPHERE CLUBS, INC. and EASTERN AIR LINES, INC.,
Debtors.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AFL-CIO,
Petitioner,

v.

MARTIN R. SHUGRUE, JR., as CHAPTER 11 TRUSTEE for EASTERN AIR LINES, INC.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Martin R. Shugrue, Jr., chapter 11 Trustee (the "Trustee") for the estate of Eastern Air Lines, Inc. ("Eastern"), respectfully requests that this Court deny the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit seeking review of the opinion in *In re Ionosphere Clubs, Inc.*, 922 F.2d 984 (2d Cir. 1990) (the "Petition").

STATUTES INVOLVED

In addition to the statutes cited in the Petition, the Judiciary Act, 28 U.S.C. § 1254(1), is implicated in this case. The pertinent text of this statute is set forth herein on page 7.

STATEMENT OF THE CASE

Background

On March 4, 1989, Eastern's aircraft mechanics and ground service workers began a primary strike. JA 686.[1] Shortly thereafter, petitioner, the Air Line Pilots Association, International ("ALPA") and Local 553, Transportation Workers Union of America, AFL-CIO joined the pilots in a sympathy strike. JA 711. As a result, Eastern's operations were almost completely grounded. On March 9, 1989, Eastern and its affiliate, Ionosphere Clubs, Inc. ("Ionosphere"), filed voluntary petitions for relief under chapter 11, title 11, United States Code (the "Bankruptcy Code").[2] JA 420.

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1. "JA ____" refers to the Joint Appendix filed in connection with the decision below.

2. Eastern and Ionosphere continued to operate their respective businesses as debtors in possession until April 19, 1990 when the United States Bankruptcy Court for the Southern District of New York (The "Bankruptcy Court") appointed the Trustee to operate their businesses and manage their properties pursuant to sections 1106 and 1108 of the Bankruptcy Code. Pet. 4A. ("Pet. ___" refers to the Petition).

After the petition was filed, in order for Eastern to rebuild its operations, it was necessary for Eastern to hire and train replacement pilots. JA 687. Before replacement pilots could operate the aircraft, however, it was necessary for them to complete a training program. *Id.* During the period the replacement pilots were training, Eastern found it necessary to lease, on a temporary basis, aircraft, together with crews to fly those aircraft (a procedure known as "wet-leasing"), from Continental Airlines, Inc. ("Continental"). *Id.* Eastern wet-leased the aircraft in order to meet published flight schedules. *Id.* Eastern ceased wet-leasing aircraft in March, 1990.

Proceedings Below

A. The Bankruptcy Court

On September 1, 1989, ALPA commenced an action in the United States District Court for the Southern District of Florida (the "Florida Court") for an order enjoining Eastern from wet-leasing on the ground that such wet-leases violated Eastern's obligations under the Railway Labor Act (the "RLA"), 45 U.S.C. § 151, *et seq.*, and for damages relating thereto (the "Florida Action"). JA 688.

Subsequently, on September 25, 1989, Eastern commenced an adversary proceeding in the Bankruptcy Court, seeking an injunction permanently enjoining ALPA from prosecuting the Florida Action (the "Wet-Lease Lawsuit"). JA 418-28. In the complaint (the "Wet-Lease Complaint"), Eastern alleged, *inter alia*, that the commencement and continuation of the Florida Action was a violation of the automatic stay of section 362(a) or, alternatively, should be enjoined under section 105(a) of the Bankruptcy Code. JA 425. The complaint also alleged that the wet-leases were reasonably necessary in the face of the strikes and were therefore permissible under the doctrine enunciated in *Bhd. of*

Ry. & S.S. Clerks v. Florida East Coast Ry., 384 U.S. 238, 248 (1966) ("*Florida East Coast*"). JA 421. Eastern also sought a temporary restraining order and a preliminary injunction.[3] JA 537-51.

After an evidentiary hearing on October 2, 1989, the Bankruptcy Court issued its decision (the "Wet-Lease Decision") and held, *inter alia*, that Eastern's interest in the wet-lease agreements was property of Eastern's estate over which ALPA sought to exercise control through the Florida Action in direct contravention of the express provisions of section 362(a)(3) of the Bankruptcy Code. JA 698-700. The court further concluded that the Florida Action was an attempt by ALPA to interfere with the Bankruptcy Court's administration of Eastern's reorganization case and exclusive jurisdiction over property of the estate and therefore should be enjoined pursuant to section 105(a) of the Bankruptcy Code. JA 700-01. In addition, the Bankruptcy Court held that by having raised Eastern's alleged violations of section 1113 of the Bankruptcy Code, ALPA had presented an issue over which, as conceded by ALPA, the Bankruptcy Court had primary jurisdiction. JA 701-02. In connection with each of these, Judge Lifland found and concluded that the wet-lease arrangements were reasonably necessary to Eastern's continued operations in the midst of a strike and were protected by this Court's holding in *Florida East Coast*. JA 701.

---

3. ALPA's implication that the Bankruptcy Court inappropriately determined, *sua sponte*, the merits of the Wet-Lease Complaint at the hearing on Eastern's motion for a preliminary injunction, *see* Pet. at 6, fn. 7, thereby depriving ALPA of the right to conduct discovery or brief its arguments, is patently false. Indeed, the Bankruptcy Court consolidated the hearing on the motion for a preliminary injunction with the trial on the Wet-Lease Complaint at *ALPA's* request. JA 674.

Previously, on July 21, 1989, ALPA filed a motion for relief from the automatic stay in order to initiate an arbitration proceeding to determine whether the affiliation of Continental and Eastern constituted a "merger," thereby triggering certain labor protective provisions ("LPPs") in the ALPA-Eastern collective bargaining agreement (the "CBA" and the "LPP Dispute," respectively). The Bankruptcy Court denied ALPA's motion on the ground that ALPA failed to show cause of precise circumstances which warranted lifting the stay (the "LPP Decision"). JA 413.

B. The District Court

On October 19, 1989, ALPA filed with the Bankruptcy Court a notice of appeal to the United States District Court for the Southern District of New York (the "District Court") from the LPP Decision (the "LPP Appeal"). Pet. 32A. On November 19, 1989, during the pendency of the LPP Appeal, ALPA filed a notice of appeal from the Wet-Lease Decision (the "Wet-Lease Appeal"). Pet. 33A. On April 10, 1990, after oral argument of the Wet-Lease Appeal, the District Court issued a consolidated decision and order with respect to both the Wet-Lease and LPP Appeals (the "District Court Order"). Pet. 6A-7A.

The District Court reversed the Wet-Lease and LPP Decisions and held that section 1113(f) of the Bankruptcy Code, enacted in 1984 in reaction to a portion of this Court's decision in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), expressly modifies sections 105(a) and 362(a) of the Bankruptcy Code to immunize arbitration and judicial proceedings to enforce collective bargaining agreements from the injunctive powers of bankruptcy courts, at least until there has been a bankruptcy court approved rejection or modification of the collective bargaining agreement. Pet. 70A-71A. The District Court based its decision on the provisions of section

1113(f) of the Bankruptcy Code, notwithstanding the fact that ALPA failed to raise this issue in either the Wet-Lease Lawsuit or the LPP Dispute.

C. The Court of Appeals

On May 3, 1990, the Trustee filed a notice of appeal of the District Court Order to the United States Court of Appeals for the Second Circuit. After oral argument, on December 21, 1990, the Second Circuit reversed that portion of the District Court Order relating to the Wet-Lease Appeal, and ruled that, contrary to the District Court Order, section 1113(f) of the Bankruptcy Code did not nullify the effect of the automatic stay extant pursuant to section 362 of the Bankruptcy Code with respect to the Bankruptcy Court's injunction of the Florida Action. Pet. 17A. In addition, the court ruled that the Bankruptcy Court's issuance of an injunction pursuant to section 105(a) of the Bankruptcy Code in furtherance of its jurisdiction did not vitiate the provisions of section 1113(f) of the Bankruptcy Code. Rather, the Second Circuit held that the mandate of section 1113(f), that no provisions of the Bankruptcy Code shall be construed to permit a debtor to unilaterally modify or terminate a collective bargaining agreement, is to be interpreted in light of the facts and circumstances of each case and not as an abstract legal concept. Pet. 12A.

Specifically, in applying section 1113(f) to the particular facts presented by the Wet-Lease Appeal, the Second Circuit determined that if ALPA had a procedural mechanism for prosecuting the Florida Action in the Bankruptcy Court, then the issuance of an injunction by the Bankruptcy Court of the Florida Action did not prevent ALPA from enforcing the CBA nor permit Eastern to unilaterally modify the CBA. Pet. 18A. Furthermore, the Second Circuit held that inasmuch as the dispute presented by the Florida Action constituted a "core

matter" within the meaning of section 157(b) of title 28, United States Code, ALPA could seek the relief requested by the Florida Action in the Bankruptcy Court. Pet. 19A-20A. The Second Circuit remanded the District Court Order for further consideration of the issues which were raised by the Wet-Lease Appeal, but not previously addressed by the District Court. Pet. 22A-23A. Indeed, a briefing schedule has already been established.

With respect to the LPP Appeal, the Second Circuit affirmed that portion of the District Court Order holding that the application of the automatic stay provisions of section 362 of the Bankruptcy Code to the LPP Dispute violated the provisions of section 1113(f) of the Bankruptcy Code. Pet. 15A-16A. The court reasoned that since the CBA provided that the issues raised by the LPP Dispute were subject to resolution by arbitration, application of the automatic stay to prevent arbitration and permit the Bankruptcy Court to adjudicate the merits of the LPP Dispute modified the arbitration clause of the CBA and, therefore, violated section 1113(f) of the Bankruptcy Code. *Id.*

REASONS FOR DENYING THE WRIT

Introduction

Contrary to ALPA's tortured analysis of the issues raised by the order below, *certiorari* should not be granted in this case. The paramount reason why this Court should deny the Petition is that it would be premature to hear the case since the order below is interlocutory and has been remanded to the District Court for further determinations. Accordingly, any determination made by the Court would merely be advisory. Not surprisingly, therefore, ALPA has failed to demonstrate any basis for its bald assertion that granting *certiorari* is appropriate "because the decision below is fundamental to the

further conduct of the case." Pet. 10, fn. 12. In addition, the relief sought by ALPA has been rendered moot due to the termination of the wet-leases, the cessation of Eastern's operations and the liquidation of its assets.

Finally, as with substantially all of the myriad of lawsuits commenced by ALPA since Eastern filed for chapter 11 protection, the overriding issue raised in the Petition is whether the appropriate venue to resolve the parties' disputes concerning the CBA is the Southern District of New York or the Southern District of Florida. While this question touches upon the scope of the Bankruptcy Court's jurisdiction under title 11 and other applicable law, it is still essentially an issue of venue, which is neither grounded in the Constitution nor an important issue warranting this Court's review. Accordingly, as demonstrated below, there is no reason for the Court to grant *certiorari*.

I. THERE IS NO REASON FOR THE COURT TO GRANT CERTIORARI BECAUSE THE INTERLOCUTORY ORDER BELOW, WHICH HAS BEEN REMANDED TO THE DISTRICT COURT, DOES NOT RAISE EXTRAORDINARY ISSUES WARRANTING THE COURT'S REVIEW UNDER 28 U.S.C. § 1254(1)

28 U.S.C. § 1254 provides, in pertinent part, as follows:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

28 U.S.C. § 1254(1) (1991). Therefore, the Court has jurisdiction to review final and interlocutory orders of federal courts of appeals whose judgments are reviewable pursuant to 28 U.S.C. § 1254(1). *See* Sup. Ct. R. 11.

As the Supreme Court Rules provide, "[a] review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Sup. Ct. R. 10. Indeed, it is well-settled that the "court should not issue a writ of *certiorari* to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co. v. Jacksonville, Tampa & Key West Ry. Co.*, 148 U.S. 372, 384 (1893).[4] Or, stated differently, *certiorari* jurisdiction is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. [citations omitted] And, *except in extraordinary cases, the writ is not issued until final decree.*" *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (emphasis added).[5] Moreover, generally, federal courts do not review interlocutory orders concerning procedural matters on the basis that such review would not materially advance the

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4. *See also* Sup. Ct. R. 11 (Court will grant *certiorari* to review a case in the court of appeals before a judgment is given in such court "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court.").

5. *Accord Estelle v. Gamble*, 429 U.S. 97, 114 (1976) (Stevens, J., dissenting) (noting that the normal practice of the Court is to deny review of interlocutory orders); *Denver v. New York Trust Co.*, 229 U.S. 123, 133 (1913) ("The exceptional power to review, upon certiorari, a decision of a Circuit Court of Appeals rendered on an appeal from an interlocutory order is intended to be and is sparingly exercised.").

ultimate termination of the litigation. *In re King Memorial Hospital, Inc.*, 767 F.2d 1508, 1510 (11th Cir. 1985); *see also Graphic Communications Union v. Chicago Tribune Co.*, 779 F.2d 13, 15 (7th Cir. 1985).

For example, in *Bhd. of Locomotive Firemen v. Bangor & Aroostock R. Co.*, 389 U.S. 327 (1967), the Court denied a petition for a writ of *certiorari* from an order of the court of appeals that had been remanded to the district court to determine whether a contempt ruling was of such magnitude to warrant retention of the fine. Citing *Hamilton-Brown*, the Court held that "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Id.* at 328.

As in *Locomotive Firemen*, the decision of the court below, which has been remanded to the District Court for further determinations, is not yet ripe for review by this Court. The test is clear, a final order is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. [citations omitted]." *Catlin v. United States*, 324 U.S. 229, 233 (1945). Inasmuch as the order below is on remand to the District Court, it does not end the litigation on the merits and a decision by this Court does not offer any possibility of ending this litigation. Specifically, even if ALPA were to prevail, which the Trustee submits is highly unlikely, and the District Court were to find that the Bankruptcy Court improperly enjoined the Florida Action in contravention of the provisions of the RLA, which is an issue on remand, any determination made by the Court would merely be advisory as the relief sought herein would be granted by the District Court. *See North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (holding federal courts do not have the power to issue advisory opinions). In addition, there is a significant possibility that the issues currently on remand to the District Court may find their way to this Court in the future. Accordingly, in furtherance of the policy of judicial economy, deliberation by this Court of

the Wet-Lease Dispute should be postponed so that all of the issues raised therein will be properly before the Court. *See Catlin v. United States*, 324 U.S. at 233-34 (discussing the federal policy against piecemeal litigation).

Moreover, ALPA has failed to present any extraordinary issues in the Petition that would require immediate review by the Court, notwithstanding the interlocutory nature of the order below. Indeed, as demonstrated below, the only issues raised in the Petition are issues of statutory construction and venue, neither of which raise Constitutional concerns or involve a conflict among the courts of appeals warranting the Court's review. Clearly, the principles of judicial economy would best be served by deferring review of the order until a final judgment has been entered by the District Court. Accordingly, there is no reason for the Court to grant *certiorari* of the interlocutory order below while a substantial portion of the litigation has been remanded to the District Court.

II. THERE IS NO REASON FOR THE COURT TO GRANT CERTIORARI BECAUSE EASTERN'S TERMINATION OF THE WET-LEASES AND THE CESSATION OF ITS OPERATIONS HAS RENDERED THE RELIEF REQUESTED BY ALPA MOOT

Article III, Section 2 of the United States Constitution, provides, in pertinent part, as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; -

> to Controversies to which the United States shall be a Party; - to Controversies between two or more States; - between a State and Citizens of another State; - between Citizens of different States; - between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const., art. III., § 2, cl. 1. Accordingly, federal courts may not decide moot or abstract questions; rather, they may hear only actual cases or controversies. *North Carolina v. Rice*, 404 U.S. at 246. "'The term 'controversies', if distinguishable at all from 'cases', is so in that it is less comprehensive than the latter, and includes only suits of a civil nature.'" *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239 (1937) (citation omitted). In determining whether a case or controversy exists, the Court has held:

> "The difference between an abstract question and a 'controversy' . . . is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."

Golden v. Zwickler, 394 U.S. 103, 108 (1969) (citations omitted).

For example, in *Preiser v. Newkirk*, 422 U.S. 395 (1975), the Court found that where the relief sought by an injunction had already been provided, and it was unlikely that the harm would be repeated, no controversy existed and the injunction proceeding was moot. *Id.* at 402-03. There, a prisoner in a maximum security correctional institution sought, *inter alia*, an injunction preventing the State of New York from transferring him to any security institution without a hearing and an opportunity to be heard, as well as his return to a medium security institution. *Id.* at 397-98. After the filing of the petition for a writ of *certiorari*, but prior to the Court's consideration of same, the prisoner was transferred to a minimum security institution. *Id.* at 402.

The Court held that the issues raised by the petition were moot since the relief sought in the injunction proceeding had been granted and no real possibility of repetition existed. *Id.* at 403-04. In so ruling, the Court reasoned that:

> The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy. As the Court noted in *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971), a federal court has neither the power to render advisory opinions nor "to decide questions that cannot affect the rights of litigants in the case before them." Its judgments must resolve "'a real and substantial controversy admitting a specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *Ibid.*, quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937). As the Court noted last Term, in an opinion by MR. JUSTICE BRENNAN, *Steffel v. Thompson*, 415 U.S. 452, 459 n. 10 (1974):

> "The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. . . .

Id. at 401 (citations omitted).

Likewise, in *Mills v. Green*, 159 U.S. 651 (1895), the Court held that where the relief sought could not be granted due to a change in circumstances, the action was moot. *Id.* at 653. There, the plaintiff filed a bill in equity on behalf of himself and all other citizens of the county in like circumstances, for an injunction against the supervisor of registration of the county. *Id.* at 651-52. The bill sought to secure a right to vote at the election of delegates to a state constitutional convention which was to take place on a specific date. The Circuit Court granted a temporary restraining order and a preliminary injunction to be continued pending determination of the plaintiff's request for a permanent injunction. *Id.* at 653. The defendant appealed to the Circuit Court of Appeals, which reversed the Circuit Court and remanded the case with directions to dismiss the bill. *Id.* The plaintiff appealed the order of the Circuit Court of Appeals to this Court and the appeal was entered. *Id.*

The defendant moved to dismiss the appeal on the basis, *inter alia*, that the action had been rendered moot inasmuch as the constitutional convention had been held prior to the plaintiff's appeal to the Court. *Id.* at 653. The Court held that the action was moot since no relief within the scope of the bill could be granted. *Id.* at 658. In its ruling, the Court reasoned that:

> The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into

> effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. . . .

Id. at 653; *see also Martin-Trigona v. Shiff*, 702 F.2d 380, 386 (2d Cir. 1983) (holding that "[t]he hallmark of a moot case or controversy is that the relief sought can no longer be given or is no longer needed.").

In the Florida Action, ALPA seeks injunctive relief enjoining Eastern from wet-leasing aircraft and crews from Continental. ALPA also seeks the recovery of damages, if any, due to such wet-leasing. However, the sole issue raised by ALPA on appeal before the District Court and the Second Circuit was the propriety of the Bankruptcy Court's injunction in light of section 1113(f) and other non-bankruptcy laws, and not the amount of ALPA's claim against Eastern in the event Eastern improperly entered into the wet-leases. Moreover, if ALPA asserts a claim for damages arising from Eastern's wet-leases, such claim will be administered by the Bankruptcy Court similar to all other claims asserted against Eastern's estate in its chapter 11 case. *See* 11 U.S.C. § 502.

The Trustee submits that the relief sought by ALPA in this proceeding before the Court has been rendered moot by Eastern's termination of its wet-leases, the cessation of its operations and the liquidation of its assets. Not only did

Eastern discontinue the action ALPA seeks to prevent by the Florida Action but, due to the cessation of its operations, there is no possibility that Eastern will enter into any wet-leases in the future. Accordingly, there is no live "controversy" raised by the Petition warranting the Court's review.[6]

Cases in which the harm asserted below is so short lived that it normally expires before review may be had are excepted from the mootness doctrine. The rationale supporting this exception is that the possibility of repetition of the type of harm asserted is very likely, yet because of the short lived nature of the order or the facts underlying the legal issues, the Court will never have an opportunity to hear a live controversy based upon the mootness doctrine. In *Merrill Lynch, Pierce,*

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6. In several cases, the Court has held that a change in circumstances which eliminates the need for injunctive relief does not moot a case so long as a " 'substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of [additional judicial relief] '" continues to exist. *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 122 (1974) (citation omitted).

These cases, however, involve "controversies" which were ripe for consideration, with no issues on remand, and/or fell into the traditional exception to the doctrine of mootness as being "capable of repetition, yet evading review." Id. at 122; *see, e.g., Super Tire Eng'g, Co. v. McCorkle*, 416 U.S. 115 (1974) (holding that, although an economic strike which had given rise to this action had ended, the parties (a corporation and a union) continued to have an interest in seeking declaratory relief, inasmuch as the availability of public assistance to striking workers directly impacted upon the negotiating positions of the parties); *United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968) (holding that the dissolution of an association that, along with its constituent members, is a party to an action against whom injunctive relief is sought, is not sufficient to moot a case inasmuch as to so hold would "leave '[t]he defendant . . . free to return to his old ways.'" [citations omitted] However, the court noted that "it is still open to appellees to show, on remand, that the likelihood of further violations is sufficiently remote to make injunctive relief unnecessary." (citations omitted)).

Fenner & Smith, Inc. v. McCollum, 469 U.S. 1127 (1985), the Court explained that this exception to the mootness doctrine is limited to instances where the following elements combine:

> "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again."

Id. at 1131 (citations omitted).

For example, in *Roe v. Wade*, 410 U.S. 113 (1973), the Court noted that because the normal 266-day human gestation period is so short, the pregnancy will usually come to term before the appellate process could be completed. The Court observed that the dispute presented the "classic justification for a conclusion of nonmootness." *Id.* at 125. Another case frequently cited in connection with this exception is *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 567-69 (1980), in which a newspaper objected to a judge's order closing a trial to the public. The Court entertained the appeal notwithstanding the apparent mootness caused by the end of the trial.

The order below does not fall within this category of cases excepted from the mootness doctrine. While the legal issue of whether section 1113(f) of the Bankruptcy Code repealed the automatic stay provisions of section 362(a) with respect to lawsuits seeking to enforce rights arising under a collective bargaining agreement is capable of repetition, it will not necessarily evade review by this Court.

Accordingly, there is no reason for the Court to grant *certiorari* of the order below which has been rendered moot

due to the termination of Eastern's wet-leases and the cessation of its operations.

III. THERE IS NO REASON FOR THE COURT TO GRANT CERTIORARI BECAUSE THERE IS NO CONFLICT AMONG THE CIRCUITS OR OTHER COMPELLING REASON WARRANTING THE COURT'S REVIEW

A. The Issue Presented By ALPA For Review Is Essentially A Question Of Venue

The dispute presented by the Wet-Lease Appeal highlights the thread of consistency throughout substantially all of the litigation between ALPA and Eastern -- a dispute over venue. Specifically, ALPA has consistently sought to have disputes resolved by the Florida Court, while Eastern, as debtor in possession, and the Trustee have asserted that the Southern District of New York, where Eastern's reorganization case has been pending for more than two years, is the appropriate venue for actions seeking to enforce the provisions of the CBA.[7] *See, e.g., Eastern Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l (In re Ionosphere Clubs, Inc. and Eastern Air Lines, Inc.)*, 89 Civ. 8250 (MBM), slip op. (S.D.N.Y. Jan. 24, 1990) (the "Bid Grievance Decision"), *reh'g denied*, 89 Civ. 8250 (S.D.N.Y. April 24, 1990), App. A[8]; *Eastern Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l (In re Ionosphere Clubs, Inc., and Eastern Air Lines, Inc.)*, 89 Civ. 0243 (MBM), slip op.

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7. Eastern initiated one action in the Florida Court in which it sought a declaratory judgment that newly hired Eastern pilots were permanent replacements for striking pilots. *See Eastern Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 744 F. Supp. 1140 (S.D. Fla. 1990), *aff'd*, 920 F.2d. 722 (11th Cir. 1991).

8. "App. ___" refers to the appendix annexed to this brief in opposition to the Petition.

(S.D.N.Y. April 30, 1990) (the "Pay Parity Decision"), App. B.

For example, the Bid Grievance Decision illustrates one of ALPA's earlier attempts to have the venue transferred to the Florida Court of a matter pending before the Bankruptcy Court with respect to a dispute regarding a provision of the CBA (the "Bid Grievance"). Specifically, ALPA moved to withdraw the reference from the Bankruptcy Court to the District Court of an adversary proceeding in which Eastern sought injunctive relief that would permit it, among other things, to retain permanent replacements hired when ALPA struck in sympathy with striking machinists. In addition, ALPA requested that the matter be transferred to the Florida Court. United States District Judge Mukasey denied ALPA's motion both to withdraw the reference and to transfer the matter to the Florida Court. App. A, 15A, 25A.

Similarly, the issues presented by ALPA in the Wet-Lease Appeal, whether section 1113(f) of the Bankruptcy Code prevented the Bankruptcy Court from enjoining the Florida Action and whether Eastern's practice of wet-leasing was reasonably necessary, was just another attempt to seek to have a dispute under the CBA adjudicated by the Florida Court. Accordingly, ALPA is seeking a writ of *certiorari* merely to have this Court address an issue of venue, which is neither a Constitutional issue nor an important issue warranting this Court's review.

B. The Second Circuit's Decision That Application Of The Automatic Stay To Actions Or Proceedings To Enforce Claims Arising Under Collective Bargaining Agreements Which Seek To Obtain Possession Of Or Exercise Control Over Property Of The Estate Or Which Would Impede The Reorganization Case Is Not In Conflict With Any Other Circuit Court Decision

In determining whether to grant a petition for a writ of *certiorari*, this Court has customarily required that the decision subject to review be in direct conflict with a decision of another court of appeals. The Court has, on occasion, dismissed a writ of *certiorari* as improvidently granted where it has later been determined that the alleged conflict between decisions of the courts of appeals does not in fact exist. *See, e.g., Wisconsin Elec. Co. v. Dunmore Co.*, 282 U.S. 813 (1931); *Keller v. Adams-Campbell Co.*, 264 U.S. 314 (1924); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923). Moreover, Rule 10 of the Supreme Court Rules specifically provides that one reason for granting *certiorari* is "[w]hen a United States court of appeals has rendered a decision *in conflict* with the decision of another United States court of appeals on the same matter. . . . Sup. Ct. R. 10 (emphasis added).

Extensive research has not revealed any opinion by any other court of appeals which addresses the issue presented by the Wet-Lease Appeal. Indeed, ALPA does not cite a single circuit or district court decision which is at odds with the decision below. Accordingly, review by this Court of the issue presented by the Wet-Lease Appeal is unwarranted since it is not clear whether any other federal court of appeals will interpret the interplay between sections 1113(f) and 362(a) of the Bankruptcy Code differently from the decision below.

1. The Interpretation Of 28 U.S.C.§ 157(b) Is Not Relevant To The Issue Presented By The Wet-Lease Appeal

In an attempt to construe the decision below in such a manner as to create a conflict with other circuit court decisions, ALPA erroneously focuses on the seeming conflict between *dictum* in the decision below regarding the Second Circuit's determination that the Wet-Lease Dispute is a "core matter" pursuant to section 157(b) of title 28, United States Code, from other circuit court decisions which have adopted a more narrow interpretation of the scope of the bankruptcy court's "core matter" jurisdiction. *See Stikel v. United States*, 76 S.Ct. 1067, 1068 (1956) (holding that dictum in lower court opinion was not reviewable by the Supreme Court).

The court below unnecessarily addressed the issue of whether the Wet-Lease Dispute was a "core matter" presumably in order to determine whether the application of section 362(a) of the Bankruptcy Code to the Florida Action would deny ALPA a forum for seeking the enforcement of the CBA. The Second Circuit reasoned that if the Florida Action did not present the Bankruptcy Court with a "core matter," then enjoining the Florida Action would deny ALPA a forum to seek the resolution of its complaint in violation of the provisions of sections 1113(f). Pet. 18A.

Even if the Florida Action was not a "core matter," however, the issues raised by the action would still be subject to the jurisdiction of the District Court pursuant to section 1334(b) of title 28, United States Code, which provides that the "district court shall have original, but not exclusive jurisdiction of all civil proceedings . . . related to cases under title 11." 28 U.S.C. § 1334(b) (1991). Therefore, even though a case under title 11 may be referred to the bankruptcy court, which is merely a unit of the district court,

pursuant to section 157(a) of title 28, United States Code, the district court retains jurisdiction over the proceeding. Accordingly, a determination of whether the Florida Action is a "core" or "non-core" proceeding is completely irrelevant to the issue of whether the merits of the Florida Action should be determined in the Southern District of New York or before the Florida Court. If ALPA were correct that the Florida Action is a "non-core" matter, which the Trustee submits it is not, the only effect would be that the District Court, as opposed to the Bankruptcy Court, would have jurisdiction to issue a final determination on the matter.

Furthermore, ALPA did not object to the issuance of a permanent injunction of the Florida Action in the Bankruptcy Court on the ground that it presented "non-core" issues. Nor did ALPA raise the issue in the Wet-Lease Appeal to the District Court. Clearly, ALPA did not raise this issue because even if it had been raised successfully, venue would still lie in the Southern District of New York. Accordingly, even if the *dictum* in the decision below with respect to the scope of the bankruptcy court's "core matter" jurisdiction were in direct conflict with other circuit decisions cited by ALPA, which the Trustee submits it is not, the issue presented by the decision below is not affected by the "core"/"non-core" distinction, and therefore, should not be considered in determining whether to grant the Petition.

Moreover, whether or not the Wet-Lease Lawsuit is a "core" proceeding is also irrelevant because ALPA repeatedly submitted itself to the jurisdiction of the Bankruptcy Court. Not only did ALPA appear before the Bankruptcy Court in connection with the consolidated hearing on Eastern's motion for a preliminary injunction and complaint for a permanent injunction of the Florida Action, but, since the inception of Eastern's chapter 11 case, ALPA has actively participated in Eastern's case before the Bankruptcy Court, both individually,

and as a member of the unsecured creditors' committee for Eastern. In addition, ALPA has filed a proof of claim in the Bankruptcy Court against Eastern's estate. Thus, the Bankruptcy Court was empowered to finally decide the issue presented by the Wet-Lease Lawsuit, even if it was not a "core" proceeding.[9] Therefore, any controversy concerning the appropriate venue for a determination of the dispute underlying the Florida Action has been rendered moot.

Notwithstanding the foregoing, the Second Circuit's interpretation of the scope of the bankruptcy court's "core matter" jurisdiction in the decision below and in *Ben Cooper* is not in direct conflict with *In re Wood*, 825 F.2d 90 (5th Cir. 1987), or other circuit cases which adopt the more limited interpretation of the scope of "core matter" jurisdiction

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9. *See Guardian Mortgage Investors v. Unofficial Noteholders - Debentureholders Creditors Committee*, 607 F.2d 1020, 1024 (2d Cir. 1979) ("since the Committee has clearly subjected itself to the jurisdiction of the bankruptcy court, there can be no doubt of that court's ability to afford Guardian whatever relief it deserves"); *see also Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782, 2784-99 (1989) (filing of a claim constitutes submission to the equitable power of the bankruptcy court); *Ben Cooper, Inc. v. Insurance Company of the State of Pennsylvania (In re Ben Cooper, Inc.)*, 896 F.2d 1394 (2d Cir), *cert. denied*, 110 S.Ct. 3269 (1990) ("*Ben Cooper*") (bankruptcy jurisdiction under Bankruptcy Amendments and Federal Judgeship Act of 1984 should be construed as broadly as possible within constitutional restraints); *In re Manville Forest Prods. Corp.*, 896 F.2d 1384 (2d Cir. 1990) (bankruptcy court has jurisdiction to consider all matters affecting the administration of the estate); *In re Fin. News Network, Inc.*, No. M-47 (MEL), slip op. (S.D.N.Y. April 18, 1991) (the Federal Trade Commission submitted itself to the jurisdiction of the bankruptcy court based upon the extent of its participation in the contested matter and the case), App. C.

adopted by the United States Court of Appeals for the Fifth Circuit.[10]

Unlike *Wood*, in which the subject matter of the dispute presented was a state law claim which related to the division of ownership of a medical clinic, and which did not have an impact on the operation of the clinic or the administration of the estate, the issues presented in the Florida Action went to the core of Eastern's operations. Indeed, the Florida Action involved the enforcement of the CBA which, pursuant to section 1113 of the Bankruptcy Code, was binding on Eastern's chapter 11 estate. If Eastern were going to continue operations in the hopes of reorganizing, interpretation of the CBA was clearly a matter concerning the administration of Eastern's chapter 11 estate pursuant to section 157(b) of title 28, United States Code. None of the cases cited by ALPA involve a dispute which affected the debtor's ability to operate its business.

Accordingly, the determination below that the Florida Action presented a "core matter" is not in *direct* conflict with *Wood* or its progeny, and there is no reason for the Court to grant *certiorari* of the order below.

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10. *See Barnett v. Stern*, 909 F.2d 973 (7th Cir. 1990); *Gouer v. Farmers Home Admin. (In re Davis)*, 899 F.2d 1136 (11th Cir.), *cert. denied*, 111 S.Ct. 510 (1990); *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183 (5th Cir. 1990); *Hays v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149 (3d Cir. 1989).

2. The Second Circuit's Determination Regarding Withdrawal Of The Reference Pursuant to 28 U.S.C. § 157(d) Is Not Relevant To The Issue Presented By The Wet-Lease Appeal

As with the distinction between "core" and "non-core" matters, whether the District Court should have withdrawn the reference of the Wet-Lease Lawsuit is irrelevant to the issue presented by the Wet-Lease Appeal. ALPA neither sought to withdraw the reference of the Wet-Lease Lawsuit, nor even raised the issue.[11] Moreover, even assuming *arguendo* that the reference were withdrawn, the venue of the Wet-Lease Lawsuit would still properly have been in the Southern District of New York and not the Florida Court. As stated, the dispute raised by the Wet-Lease Appeal is whether the Florida Court or the Southern District of New York should resolve the Wet-Lease Lawsuit. Withdrawal of the reference would not have resolved this dispute.

The fact that withdrawal of the reference would not have resolved ALPA's efforts to have the Wet-Lease Lawsuit adjudicated by the Florida Court, indicates why ALPA failed to raise this issue below. ALPA only raises this issue in the Petition in an effort to find some basis for the issuance of such an extraordinary writ. Accordingly, whether or not a conflict exists among the lower courts concerning the circumstances

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11. Section 157(d) of title 28, United States Code, provides, in pertinent part:

> The district court shall, on *timely* motion of a party, so withdraw a proceeding if...

As stated, ALPA first raised the issue of whether the reference of the Wet-Lease Lawsuit should have been withdrawn only after the court below rendered its decision. Raising this issue at the present juncture can hardly be considered timely.

upon which the reference should be withdrawn from the bankruptcy court to the district court is completely irrelevant to the controversy addressed by the decision below. Clearly, under these circumstances, any determination by the Court regarding this issue would result in the issuance of an advisory opinion. Accordingly, there is no reason for the Court to grant *certiorari*.

C. The Wet-Lease Appeal Does Not Present Any Issues Of Compelling Importance Warranting This Court's Review

As stated, the dispute herein is solely an issue of the appropriate venue in which to litigate claims arising under the CBA. Although questions of venue often involve considerations of judicial economy and convenience, it can hardly be said that the issue presented by this appeal rises to the level of Constitutional importance justifying review by the Court in the absence of other compelling reasons to grant the Petition.

Moreover, contrary to ALPA's assertions, the decision below is not in conflict with section 1113(f) of the Bankruptcy Code. Indeed, the Second Circuit's affirmance of the Bankruptcy Court's stay of the Florida Action illustrates that the provisions of sections 362(a) and 1113(f) can be interpreted to give each provision its intended effect.

1. The Automatic Stay and The Bankruptcy Court's Other Injunctive Powers Further The Policy of Centralization of Dispute Resolution

The automatic stay is "one of the most fundamental protections provided [to the debtor] by the bankruptcy laws." *Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection*, 474 U.S. 494, 503 (1986) (quoting S. Rep. No. 95-989, 95th Cong., 2d Sess., 340 (1977)); *see In re Johns-Manville Corp.*,

57 Bankr. 680, 685 (Bankr. S.D.N.Y. 1986). As the court below recognized, the automatic stay promotes two purposes of the Bankruptcy Code. "First, the automatic stay 'provides the debtor with 'a breathing spell from his creditors.'" Pet. 8A (citation omitted). "In addition, the automatic stay allows the bankruptcy court to centralize all disputes concerning property of the debtor's estate in the bankruptcy court so that reorganization can proceed efficiently, unimpeded by uncoordinated proceedings in other arenas." *Id.*

2. Section 1113 Of The Bankruptcy Code Was Adopted To Ensure That Collective Bargaining Agreements Would Remain In Effect Until The Procedural And Substantive Standards For Rejection Have Been Met

The court below also correctly held that section 1113 of the Bankruptcy Code was enacted as a response to the Court's holding in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984). In *Bildisco*, the Court held "that the filing of a petition in bankruptcy rendered collective bargaining agreements unenforceable." Pet. 8. In order to reverse the effect of *Bildisco*, Congress enacted section 1113 of the Bankruptcy Code, which established certain procedural and substantive standards which have to be satisfied prior to seeking the modification or termination of a collective bargaining agreement. Pet. 9A.

To ensure that these requirements are not circumvented, Congress enacted section 1113(f) of the Bankruptcy Code which provides:

> No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining

> agreement prior to compliance with the provisions of this section.

11 U.S.C. § 1113(f) (1991). The court below correctly determined that, while Congress did intend to prevent debtors from escaping their obligations under collective bargaining agreements prior to satisfying the standards of section 1113, it did not intend to "preclude application of the automatic stay to any dispute involving a collective bargaining agreement. . . ." Pet. 11A.

3. The Decision Below Is Consistent With The Provisions of Both Section 1113 and Section 362 Of The Bankruptcy Code

The court below correctly interpreted the provisions of section 1113(f) of the Bankruptcy Code consistent with accepted rules of statutory construction by applying the language of section 1113(f) literally to the circumstances presented by the Wet-Lease Lawsuit. *See Kaiser Aluminum & Chem. Corp. v. Bonjorno,* 110 S.Ct. 1570, 1575 (1990) (holding absent clearly expressed legislative intent to the contrary, the statutory language is conclusive); *California Chieftan v. Air Vermont, Inc. (In re Air Vermont, Inc.),* 761 F.2d 130, 134 (2d Cir. 1985) (where statute is unambiguous on its face, the statute's literal meaning must be applied "unless there is something to make plain the intent of Congress that the letter of the statute is not going to prevail."). In conducting an analysis of the statute, the Second Circuit held that the plain language of section 1113(f) did not require the repeal of the automatic stay with respect to *all* actions seeking the enforcement of a collective bargaining agreement. In so holding, the court below complied with this Court's recent ruling in *West Virginia Univ. Hosp., Inc. v. Case,* No. 89-994 (S.Ct. March 19, 1991) (LEXIS, Gen Fed Library,

Cases) (1991 U.S. WL34485), in which the Court directed that:

> As we have observed before, however, the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone. *See Rodriquez v. United States*, 480 U.S. 522, 525-526 (1987). The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous -- that has a clearly accepted meaning in both legislative and judicial practice -- we do not permit it to be expanded or contracted by legislators or committee during the course of the enactment process. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) ("[W]here, as here, the statute's language is plain, 'the sole function of the court is to enforce it according to its terms.'"), quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

Clearly, section 1113(f) does *not* evidence an intent to repeal the provisions of section 362 of the Bankruptcy Code; therefore, the court below was correct in reversing the District Court Order which unnecessarily read a sweeping repeal of the automatic stay provisions of section 362 of the Bankruptcy Code.

In an attempt to reconcile any apparent conflict which may arise in certain circumstances between the provisions of section 1113(f) and section 362 of the Bankruptcy Code, the court below correctly identified its duty to interpret sections of statutes in such a way as to give full force and effect to each provision and to the legislative policies of each. Pet. 13A; *see*

Strobl v. New York Mercantile Exch., 768 F.2d 22 (2d Cir.), *cert. denied*, 474 U.S. 1006 (1985).

As stated, section 362(a) of the Bankruptcy Code provides for the automatic stay of the commencement or continuation of any action against property of a debtor's estate. This provision allows for the bankruptcy court to become the central forum for disputes concerning the administration of the chapter 11 estate. *In re Colin, Hochstein Co.*, 41 Bankr. 322, 325 (Bankr. S.D.N.Y. 1984).

Section 1113, on the other hand, establishes the requirements which must be satisfied before a collective bargaining agreement can be modified or rejected. *Century Brass Prods., Inc. v. Int'l Union, United Auto. Aerospace and Agric. Workers (In re Century Brass Prods., Inc.)*, 795 F.2d 265, 272 (2d Cir.), *cert. denied*, 479 U.S. 949 (1986). However, section 1113 is silent as to the proper forum for the enforcement of rights under collective bargaining agreements. Accordingly, the court below interpreted section 1113(f) to preclude the application of section 362(a) in those instances where such application would prevent a union from enforcing its rights under a collective bargaining agreement. Pet. 14A. In adopting the foregoing interpretation, the court below specifically limited the number of instances in which the application of section 1113(f) would require the repeal of section 362 of the Bankruptcy Code.

Accordingly, with respect to the Wet-Lease Lawsuit, the court below correctly held that since the Florida Action was a "core matter" and ALPA could seek relief in the Bankruptcy Court, the injunction of the Florida Action under section 362 did not conflict with the provisions of section 1113(f). Pet. 17A. Therefore, inasmuch as the court below correctly interpreted Congressional intent behind the enactment of section 1113(f) of the Bankruptcy Code, and such

interpretation is not in conflict with the decisions of any other circuit courts of appeals, there is no reason for the Court to grant *certiorari* of the Petition.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

Opinion and Order of the United States District Court Southern District of New York

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

89 Civ. 8250 (MBM)

In re: Case Nos. 89 B 10448 (BRL)
89 B 10449 (BRL)

IONOSPHERE CLUBS, INC. and
EASTERN AIRLINES, INC.,

Debtors.

EASTERN AIRLINES, INC.

Plaintiff,

-against-

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, EASTERN AIR LINE MASTER EXECUTIVE COUNCIL,

Defendant.

ADV. PRO. No. 89-6590A

Appendix-A Opinion and Order of the United States District Court Southern District of New York

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Opinion and Order of the Court

MICHAEL B. MUKASEY, U.S.D.J.

The Air Line Pilots Association, International ("ALPA"), which represents certain current and former pilots employed by Eastern Airlines, has moved to withdraw from the Bankruptcy Court to the District Court an adversary proceeding filed by Eastern, and has asked that that proceeding be transferred to the U.S. District Court for the Southern District of Florida. To accomplish the withdrawal, ALPA invokes 28 U.S.C. § 157(d), which permits a bankruptcy court proceeding to be withdrawn to the district

court "in whole or in part . . . for cause shown," and requires such withdrawal "if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce." To justify the transfer, ALPA cites factually related litigation commenced by Eastern in the Southern District of Florida, and relies on 28 U.S.C. § 1404(a), which authorizes transfer of a case "[f]or the convenience of parties and witnesses, in the interest of justice . . . to any other district . . . where it might have been brought."

In the adversary proceeding, Eastern has sought declaratory and injunctive relief that would permit Eastern to retain permanent replacements hired when ALPA struck in sympathy with striking machinists, to continue in effect work rules that arguably would delay the rehiring of certain former strikers, and to do both without submitting the underlying issues to arbitration otherwise mandated by he Railway Labor Act ("RLA"). ALPA, by contrast, suggests a congeries of issues under the RLA and the Norris-La Guardia Act ("NLGA") that allegedly require the attention of a district court and justify withdrawal of Eastern's proceeding from the Bankruptcy Court. However, ALPA seeks to have most of the factual claims in Eastern's complaint resolved ultimately not by a district court, either here or in Florida, but by a System Board of Adjustment arbitrator appointed pursuant to the RLA.

For the reasons set forth below, the motion to withdraw is granted only to the extent that questions of law are discussed and decided herein, the motion to transfer is denied, and

following such withdrawal the remainder of the proceeding is remanded to the bankruptcy court for decision.[1]

I.

A. The ALPA Strike

On March 4, 1989 Eastern's aircraft mechanics and ground service workers represented by the International Association of Machinists ("IAM") began a primary strike. ALPA agreed that its members would honor the IAM picket lines and strike in sympathy with the IAM. Eastern, beset by these and other problems, filed a petition in the Bankruptcy Court for this District on March 9, 1989 under Chapter 11 of the Bankruptcy Code. In an effort to continue operations and maintain flight schedules, Eastern hired permanent replacements for many of the striking pilots. Eastern's contract with ALPA, however, remained in effect. Among the provisions of that contract are those governing seniority and the procedure for assigning pilots to particular flights. Seniority rights are established by Section 18 of the contract, which provides also that seniority governs promotion, retention, reassignment and recall of pilots following layoff. (Linsey Aff. Exh. A1 [hereinafter "Contract"] § 18 C). In essence, the assignment procedure allows pilots to bid on flights based on domicile (airport location) and seniority, such

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1. ALPA has suggested that if any part of the proceeding is to be withdrawn, it must all be withdrawn and decided in the District Court. The language of § 157(d) permits a district court to withdraw a proceeding "in whole or in part" when cause is shown and requires that the district court "so withdraw" the proceeding (*i.e.*, in whole or in part) when statutes outside the Bankruptcy Code must be considered.

that pilots with greater seniority at each domicile are permitted to choose the flights they preferred and thereby to hold "category positions," assuming they are qualified to fly the categories of equipment used on those flights. (Contract, § 27) Vacancies at domiciles within the system are filled periodically by system-wide bids, also determined by seniority and equipment qualification. (Contract, § 28) A letter agreement annexed to the contract permits Eastern to use "flow bids" to adjust crew assignments between periodic system-wide bids pursuant to § 28 of the contract. (Document 28, dated July 30, 1980).

Eastern issued a system-wide bid on May 3, 1989, effective August 1, 1989, open to "pilots on active status (working, in training or on authorized leave) as of the bid deadline" and to a "striking pilot who has made an unconditional offer to return to work by the bid deadline . . . if there is a vacancy available at the time of the award, i.e. if his numerical position on the recall list is such that, when added to the total number of working pilots (including permanent replacements) and pilots above him on the recall list, he is within the total number of pilots required for the bid." (Linsey Aff. Exh. A2) According to ALPA, this bid purported to eliminate all pre-strike category positions held by striking pilots as of August 1, 1989. (Linsey Aff. ¶ 11) Eastern issued further such system-wide bids on July 19, 1989, effective October 1, 1989, covering more than 450 vacancies caused by an expansion of operations (Linsey Aff. Exh. A3), and on November 6, 1989, effective March 2, 1990, covering more than 400 further vacancies. (Linsey Aff. Exh. A4) In addition, on October 13, 1989 Eastern issued a "flow bid" under Document 28, effective January 1, 1990, to cover 27 additional vacancies. (Linsey Aff. Exh. A5)

Appendix-A Opinion and Order of the United States District Court Southern District of New York

Despite their participation in the sympathy strike, Eastern pilots continued to submit bids for future flights. When Eastern refused to honor those bids, ALPA filed grievances on June 8 (Linsey Aff Exh. A6, relating to the May 3, bid), August 4 (Linsey Aff. Exh. A7, relating to the July 19 bid), November 17 (Linsey Aff. Exh. A8, relating to the November 6 bid) and December 8 (Linsey Aff. Exh. A9, relating to the October 13 "flow bid") In addition, ALPA filed on September 11, 1989 a grievance relating to Eastern's refusal to honor the seniority of pilots who had participated in the sympathy strike and then returned to work to find their positions had been filled by newly hired permanent replacements. (Linsey Aff. Exh. A10)

The grievances relating to the first two system-wide bids, of June 8 and August 4, and to Eastern's alleged denial of seniority rights to returning former strikers, were heard within Eastern and yielded results unfavorable to ALPA. (Linsey Aff. Exhs. A11, A12, A13) The ALPA-Eastern collective bargaining agreement is governed by the RLA, made applicable to air carriers by 45 U.S.C. § 181; grievances remaining unresolved after the initial steps of the grievance process are decided by the ALPA-Eastern System Board of Adjustment established pursuant to the RLA -- that is, by arbitration. 45 U.S.C. § 184.

On November 22, 1989 ALPA notified Eastern by letter that it was ending its sympathy strike. By then, Eastern and ALPA has been engaged in legal maneuvering for months. To a somewhat greater extent than is strictly relevant, but in order to convey the flavor, that maneuvering may be summarized as follows. In March 1989, after the Chapter 11 filing, Eastern began a lawsuit in the Southern District of Florida seeking a

declaratory judgment validating work rule changes that expanded the number of hours pilots were permitted to fly. (Linsey Aff. Exh. C) Such rule changes would allow the airline to use fewer pilots. Apparently displeased with the judge assigned by lot to the case, Eastern never pursued that action and it was dismissed *sua sponte* on July 17, 1989. (Linsey All. Exhs. C, D) Eastern moved in the bankruptcy Court in June to reject its contract with ALPA pursuant to 11 U.S.C. § 1113, but thereafter withdrew that motion. (Linsey Aff. Exh. E) On August 11, 1989, Eastern filed yet another lawsuit in the Southern District of Florida seeking a declaratory judgment that its permanent replacement of strikers was lawful. That case was not assigned to the same judge as the first had been. (Linsey Aff. Exh. F) On September 1, 1989 ALPA sued in the Southern District of Florida to stop Eastern from leasing planes and crews from other airlines ("wet leasing"), a lawsuit enjoined by the Bankruptcy Court on October 4, 1989 as a violation of the automatic stay provisions of 11 U.S.C. § 362. (Eastern App. Exh. 6A) This was the point to which the parties' thrust and parry had progressed by the time ALPA decided to call off the sympathy strike.

B. Events Following the Strike

When ALPA members sought to return to work and found that Eastern had filled their positions by hiring replacements who had been promised permanent employment, the procedural swordplay began in ernest. On November 24, 1989 Eastern moved to amend its complaint in the Southern District of Florida to include all the issues raised in what would later become the Bankruptcy Court complaint that is subject of this proceeding, seeking a declaration that its bids

and hiring of permanent replacements for striking ALPA pilots were proper. (Linsey Aff. Exh. G) On December 8, 1989 ALPA sought to consolidate before the System Board of Adjustment arbitrator, and to expedite for hearing, all the grievances it had filed with respect to the bids and Eastern's hiring of permanent replacements, including both those that had been heard initially within Eastern and those that had not yet reached that procedural step. (Linsey Aff. Exh. A19)

On December 11, 1989 Eastern filed in Bankruptcy Court the adversary proceeding at issue here, seeking to place before the Bankruptcy Court issues ALPA would have preferred to arbitrate before the System Board of Adjustment under the RLA, and secured a temporary restraining order halting the proposed arbitration and scheduling a hearing for December 15. The same day, ALPA notified the District Court in Florida that it consented to the filing of Eastern's proposed amended complaint, and that it planned to file counterclaims that would put in issue not only Eastern's bids and hiring of permanent replacements for striking ALPA pilots, but also Eastern's alleged improper refusal to bargain with ALPA and alleged attempt to undermine ALPA's status as bargaining agent. (Linsey Aff. Exh. J) That maneuver apparently was intended to place before the Florida federal court the issues Eastern was seeking to litigate in the New York Bankruptcy Court (which in turn were largely the issues ALPA was seeking to litigate before the System Board of Adjustment), or at least to present to the Florida court the question of whether those issues would be litigated before an arbitrator under the RLA or a bankruptcy judge. Here ALPA appears to have been motivated in its choice of forum by both the earlier Bankruptcy Court injunction against its Florida action to challenge wet leasing, and also by a November 29, 1989

finding of the Bankruptcy Court that ALPA and IAM had participated in widespread unlawful harassment of Eastern employees. (Eastern App. Exh. 7 at 105-06)

The next day, December 12, the Bankruptcy Court having enjoined the arbitration, Eastern moved in the Southern District of Florida to withdraw its motion to amend the complaint in that Court (Linsey Aff. ¶ 23 and Exh I), thereby seeking to head off ALPA's proposed counterclaims and to avoid placing the grievance and work rule issues before the Florida court. Not to be outdone, ALPA would later seek an emergency hearing before the Florida court to consider its application to file counterclaims, apparently so as to abort Eastern's attempt to withdraw the motion to amend the complaint. (ALPA App. to Reply Mem., Exh. 3)

On December 13, ALPA filed its application to withdraw Eastern's adversary proceeding from the Bankruptcy Court and this Court stayed the December 15 hearing. Thereafter, following oral argument, this Court on December 29 amended its earlier stay to permit the Bankruptcy Court to determine the applicability of the automatic stay provisions in Bankruptcy Code § 362(a)(3) to the grievances commenced by ALPA.

C. Eastern's Bankruptcy Court Complaint

Eastern's complaint in the Bankruptcy Court contains five separate claims in relief, denominated counts. The first four counts raise issues that are also the subject of ALPA grievances. In Count I, Eastern asks the Bankruptcy Court to bar ALPA from pursuing the pending grievances anywhere but in that Court. In Count II, Eastern requests simply a stay of the pending grievances. In Count III, Eastern asks the

Bankruptcy Court to resolve those grievances in Eastern's favor. The grievances, it will be recalled, relate to Eastern's refusal both to honor bids from striking ALPA pilots and to recognize the seniority of returning strikers in preference to replacement pilots hired during the strike.

Count IV of Eastern's Bankruptcy Court complaint seeks a declaratory judgment that no active pilot need be displaced by a returning striker. In this Court, Eastern does not purport to seek relief because of a pending arbitration. Instead, Eastern claims that ALPA expressed in its November 22, 1989 letter to Eastern the intent to demand such displacement of active pilots when the seniority of returning strikers would require it. But whether the Contract requires such displacement is the same issue raised by ALPA's September 11, 1989 grievance discussed in connection with Count III, and should be resolved the same way.

Count V is not the subject of any arbitration demand by ALPA. In that count, Eastern seeks a declaration that it may continue in effect temporary work rules that lengthened the hours of pilots, implemented during the strike, until either sufficient returning strikers have been retrained or Eastern's schedule has been reduced, or some combination of both, to the point where pre-strike work rules may be restored.

Eastern has alleged, and ALPA does not appear to deny, that the stakes underlying the dispute are potentially so costly to Eastern as to threaten its ability to continue operations. (Complaint, ¶¶ 27-29) At issue is whether Eastern will have to incur millions of dollars in retraining costs for more than 1,800 returning pilots, and possibly incur substantial liability to replacements hired with the promise of permanent

employment. Eastern has argued, and ALPA has agreed, that the pendency of this controversy interferes with Eastern's ability to offer a reorganization plan and casts doubt on whether such a plan can go forward successfully. (12/28/89 Tr. 5-6, 22-23)

II.

Under 28 U.S.C. § 157(d), withdrawal of a proceeding from the bankruptcy Court is mandatory if "resolution of the proceeding requires consideration of both title 11 and other laws . . . regulating organizations or activities affecting interstate commerce." That section was part of the legislation enacted in 1984 following the Supreme Court decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), holding that insofar as Section 241(a) of the Bankruptcy Reform Act of 1978 permitted a debtor in possession to sue in bankruptcy court for breach of contract, that section unconstitutionally denied defendant in that case the right to have the controversy heard by an Article III judge. "Section 157(d) serves two functions: it is an attempt to insulate the 1984 legislation against successful constitutional attack, and to single out a special type of adversary proceeding for separate treatment." 1 L. King, *Collier on Bankruptcy*, ¶ 3.01 at 3-62 (1889 ed.). The same commentator has noted that to the extent motivated by constitutional concerns arising from *Marathon*, the statute literally read may be overly broad. *Id.*

The purpose of § 157(d) is to assure that an Article III judge decides issues calling for more than routine application of statutes outside the Bankruptcy Code. 1 L. King, *Collier on Bankruptcy*, ¶ 3.01 at 3-66-67 (15th ed. 1989). In order to

preserve the purposes and structure of the Bankruptcy Code, courts have heeded the observation during the Congressional debates that it "was not intended to become 'an escape hatch through which most bankruptcy matters will be removed to the district court' . . . and . . . that district courts 'should not allow a party to use this provision to require withdrawal where such laws are not material to the resolution of the proceeding' . . . ." *In re White Motor Corp.*, 42 B.R. 693, 704 (N.D. Ohio 1984), *quoting* 130 Cong. Rec. H1850 (daily ed. March 21, 1984) and 130 Cong. Rec. S6081 (daily ed. June 19, 1984). Accordingly, the section has been read narrowly. Withdrawal has been granted when substantial interpretation of federal statutes other than the Bankruptcy Code has been found necessary, *e.g.*, *In re Chateaugay Corp.*, 86 B.R. 33 (S.D.N.Y. 1987), but denied when only routine application of established legal standards is called for, *In re Ionosphere Clubs, Inc.*, 103 B.R. 416, 420 (S.D.N.Y. 1989), or when it is not clear that application and interpretation of statutes other than the Bankruptcy Code will be necessary to resolve the case. *In re White Motor Corp.*, *supra.*

ALPA insists that substantial interpretation of statutes outside the Bankruptcy Code is necessary to resolve this case because of a wide variety of unsettled issues the union hypothesizes. As discussed below in part IV of this opinion, however, those issues either are not so novel as ALPA suggests, or they can be resolved at this stage in such a fashion as to permit the Bankruptcy Court to resolve the factual issues in the case. Further, ALPA is seeking to have the factual issues underlying Counts I through IV of Eastern's complaint decided not by an Article III judge but by a statutorily designated arbitrator under the RLA. As to those issues that ALPA seeks to arbitrate, the only question that

arguably should be decided by an Article III judge is who should resolve those issues, not how they should be resolved. That question turns on whether the policy underlying the dispute resolution provisions of the RLA requires that an arbitrator rather than a bankruptcy judge resolve these issues in this case. As set forth below in part V of this opinion, the RLA procedures here must yield to those prescribed by the Bankruptcy Code.

III.

ALPA would have this Court follow its arguments closely enough to discern questions calling for substantial interpretation of federal statutes outside the Bankruptcy Code, but not so closely as to interpret those statutes and answer those questions. Rather, as soon as such questions are perceived, through the mist as it were, ALPA would have this Court back away and transfer the case to the Southern District of Florida. That involves a potentially cumbersome analysis: decide first whether questions warranting withdrawal are present; then, having taken care to define but not answer those questions, determine whether a transfer is necessary; if no transfer is necessary, return to answer the questions that prompted the withdrawal.

It seems simpler to deal first with the transfer motion. Assuming that an Article III judge must decide any issues in this case, should the Article III judge be one in this Court or in the Southern District of Florida? A transfer under 28 U.S.C. § 1404(a) is proper only when necessary to serve "the convenience of parties and witnesses, in the interest of justice." ALPA has offered no considerations of convenience that recommend a transfer, nor could it. Eastern's bankruptcy

is being administered in this District, and it would be a substantial inconvenience to all concerned for this matter to be referred to the Southern District of Florida, which from all appearances has not dealt with any substantive dispute between the parties but has been employed by the parties instead merely as the site of intermittent diversions. ALPA seems to complain that Eastern has staged more of these diversions than ALPA itself, and did so earlier than ALPA, and therefore should not be heard to complain about litigating in the Southern District of Florida. Which is to say, the "interest of justice" ALPA has in mind is poetic justice. The statute, however, was meant to serve more prosaic ends such as reducing inconvenience and expense, *Van Dusen* v. *Barrack*, 376 U.S. 612, 616 (1964), none of which would be advanced in this case by a transfer.[2] Accordingly, the transfer motion is denied.

IV.

We can now return to the questions at hand -- namely, whether the bankruptcy judge or an RLA arbitrator should resolve those factual issues in Counts I through IV of the

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2. Besides, the procedural shenanigans were the work of the lawyers, not the client. If poetic justice is the goal, it can be achieved with near surgical precision before the bankruptcy court of Judge Lifland, who will determine the fees to be collected by those lawyers. Bankruptcy Rule 219. In addition, the Examiner Judge Lifland has appointed pursuant to 11 U.S.C. § 1104, David I Shapiro, Esq., who has functioned as a mediator in an attempt to help Eastern's reorganization effort succeed, has told this court both in writing and orally that he will oppose Eastern's attempt to stay the ALPA arbitrations unless Eastern stops litigating labor related issues piecemeal, abandons its Florida action and agrees to litigate all labor related issues before the Bankruptcy Court. (12/28/89 Tr. 51)

Eastern complaint, which have been the subject of ALPA grievances, and whether the bankruptcy judge or a district judge should resolve the factual issues in Count V. Despite ALPA's objections, there is nothing to prevent the Bankruptcy Court from deciding the issues posed in all counts of Eastern's complaint.

The policy of Chapter 11 is to permit successful rehabilitation of debtors, *N.L.R.B.* v. *Bildisco & Bildisco*, 465 U.S. 513, 527 (1984); the bankruptcy court is granted broad jurisdiction to promote that policy, and equitable power to protect that jurisdiction. Thus, the bankruptcy court has exclusive jurisdiction over the debtor's assets, 28 U.S.C. § 1334(d), proceedings threatening those assets are automatically stayed unless the bankruptcy court orders otherwise, 11 U.S.C. § 362, and the bankruptcy court may hear and decide claims against the debtor, 28 U.S.C. § 257(b) and (c), and may issue any order, process or judgment necessary to carry out its powers. 11 U.S.C. § 105(a); *In re Chateaugay Corp.*, 93 B.R. 26, 29 (S.D.N.Y. 1988).

However, 28 U.S.C. § 157(d) operates to some extent as a limitation on the exercise of those powers by a bankruptcy judge by authorizing withdrawal of a case or proceeding "in whole or in part" from the bankruptcy court to the district court "for cause shown," and requiring such withdrawal when "resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating . . . interstate commerce." ALPA asserts that the Bankruptcy Court may not hear and decide Eastern's complaint because that complaint raises several questions of federal law beyond the Bankruptcy Code. ALPA alleges that these questions must

be resolved in order to decide the claims in Eastern's complaint and therefore compel withdrawal pursuant to 28 U.S.C. § 157(d). But not all of the questions ALPA has conjured are unsettled, and even those that are do not generate answers that cast doubt on the Bankruptcy Court's authority to decide the underlying issues between the parties.

ALPA argues that among these unsettled questions is whether the anti-injunction provisions in Sections 4 and 7 of the NLGA, 29 U.S.C. §§ 104 and 107, prevent a bankruptcy court from enjoining an arbitration. Yet there is ample precedent to support the view that the NLGA bars only injunctions that limit or prohibit concerted labor activity or coercive conduct between parties to a labor dispute, not injunctions halting arbitration. *Menorah Home and Hospital* v. *Local 144*, 573 F. Supp. 908 (E.D.N.Y. 1983), *aff'd without op.*, 751 F.2d 370 (2d Cir. 1984); *Umeko. Inc.* v. *New York Coat, Suit, Dress, Rainwear & Allied Workers Union*, 484 F. Supp. 210 (S.D.N.Y. 1980); *American Broadcasting Companies* v. *American Federation of Television and Radio Artists*, 412 F. Supp. 1077 (S.D.N.Y. 1976).

ALPA argues further that no authority establishes the bankruptcy court's power to enjoin an arbitration mandated by the RLA, a federal statute outside the Bankruptcy Code. That limited proposition may be true, but there is authority recognizing a bankruptcy court's power to enjoin administrative proceedings under the National Labor Relations Act, *N.L.R.B.* v. *Superior Forwarding. Inc.*, 762 F.2d 695, 698 (8th Cir. 1985), and ALPA has not argued persuasively why that power should not extend to RLA arbitration on the facts of this case. Although ALPA did not raise the point, I do not believe *In re Goodman*, 873 F.2d 598, 603-04 (2d

Cir. 1989) requires a different result. In that case, the Second Circuit, *per* Judge Newman, read *Superior Forwarding* to authorize a bankruptcy court injunction against an administrative proceeding when the matter in dispute involved only contract interpretation and did not lie within the primary jurisdiction of the N.L.R.B., the administrative agency in question. Accordingly, the Second Circuit found no inconsistency between *Superior Forwarding* and its own holding that a bankruptcy court had no jurisdiction to enjoin an N.L.R.B. proceeding after the bankruptcy had terminated and the agency was in process of determining whether the bankrupt was the successor to entities that had committed unfair labor practices.

In this case, as in *In re Goodman*, at least that part of the dispute that involves ALPA grievances arguably involves simply contract interpretation. Eastern argues that there is no basis in the contract for the result ALPA seeks in arbitration, or indeed for arbitrating the dispute at all. A court would certainly have the authority to enjoin an arbitration if the position of the party seeking arbitration were frivolous. *Consolidated Rail Corp.* v. *Railway Labor Exec. Ass'n*, 109 S. Ct. 2477, 2482 (1989). ALPA has offered no reason why that authority may not be exercised by a bankruptcy court. *See In re Al-Cam Development Corp.*, 99 B.R. 573 (Bankr. S.D.N.Y. 1989). Moreover, here, unlike *In re Goodman*, the bankruptcy proceeding, a Chapter 11 reorganization, is ongoing, and the very pendency of the dispute inhibits presentation and adoption of a plan.[3]

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3. Apart from arising in a far different factual setting, *In re Goodman* itself cited the long established doctrine that "[f]ederal courts may decide labor

(continued...)

ALPA seems to allege that the Bankruptcy Court is incapable of applying the recent Supreme Court decision in *Trans World Airlines. Inc.* v. *Independent Fed'n of Flight Attendants*, 109 S.Ct. 1225 (1989). ("TWA v. IFFA") ALPA reads Eastern's complaint to suggest an over-broad application of that case, and then argues that the prospect of such an over-broad application poses a novel question that must be decided by an Article III judge. As should be clear in a moment, Eastern's complaint need not be read to prescribe a misapplication of *TWA* v. *IFFA*, but even if it did there is no reason to believe that the Bankruptcy Court cannot apply the case properly.

TWA v. *IFFA* holds only that the RLA does not compel a carrier to reinstate returning strikers in preference to junior personnel who worked during the strike. The opinion in that case does point out that the collective bargaining agreement between the parties contained no clause requiring such reinstatement, 109 S.Ct. at 1231, n.1, 1235, and thereby appears to acknowledge that union and management may contract to compel such reinstatement. Eastern's complaint alleges that ALPA is seeking in the proposed arbitrations to circumvent *TWA* v. *IFFA*. (*e.g.*, Complaint ¶¶ 34(b), 41) I read that allegation to say only that the contract between

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3. (...continued)
law questions that 'emerge as collateral issues in suits brought under independent federal remedies.'" 873 F.2d at 603, quoting *Communications Workers of America* v. *Beck*, 108 S.Ct. 2641, 2647 (1988). The Bankruptcy Code is certainly an "independent remedy," and labor law questions, to the extent they emerge, would appear to emerge as collateral issues in Eastern's action. That doctrine at least makes clear that the concept of primary jurisdiction itself must be harmonized with the demands of other federal statutes.

Eastern and ALPA contains no provision requiring such reinstatement, and that ALPA is therefore seeking to obtain in arbitration something it is not entitled to; I do not read it to suggest that *TWA* v. *IFFA* would prevent such a provision, implicit or explicit, from being enforced. *See Railway Labor Exec. Ass'n*, 109 S. Ct. at 2484-85 ("agreements may include implied as well as express terms"). But even if the complaint did suggest such an interpretation of *TWA* v. *IFFA*, reading the case and finding it does not say that is not a sacrament vouchsafed only to an Article III judge.

Finally, the union argues that to the extent Eastern seeks relief inconsistent with ALPA's view of the law, arguably in Counts I, III and V of the complaint, Eastern's suit raises issues that must be decided in the District Court. ALPA urges that Eastern is seeking improperly to validate after the fact steps it took unilaterally during the strike, including refusal to accept bids from striking pilots, refusal to recognize the seniority of striking pilots in preference to permanent replacements, and, in Count V of its complaint, implementation of work rules that lengthened the hours pilots could work. ALPA urges that although a struck carrier lawfully may take steps reasonably necessary to continue operations, even when those steps conflict with the terms of a collective bargaining agreement, no authority permits the carrier to act without securing court approval and such steps must be reversed immediately upon the termination of a strike. ALPA insists further that Eastern in any event is barred by the doctrine of unclean hands from taking such steps because it refused binding arbitration with the IAM before ALPA struck in sympathy with the IAM.

Appendix-A Opinion and Order of the United States District Court Southern District of New York

Eastern's rights here are governed by *Brotherhood of Ry. & S.S. Clerks* v. *Florida East Coast Ry. Co.*, 384 U.S. 238 (1966), which holds that once a union is free to strike, a carrier is also free to rely on self-help by making unilaterally those contract changes "reasonably necessary" for continued operation. 384 U.S. at 244, 247-48. What is "reasonably necessary" or "truly necessary in light of [the particular facts of the case]," 334 U.S. at 248, is a factual matter well within the competence of a bankruptcy court. Indeed, it would seem that a bankruptcy court, familiar with the economic constraints operating on the carrier, is peculiarly well situated to decide what is "reasonably necessary" and what is not. Moreover, nothing in *Florida East Coast* holds that advance approval from a court must be secured. To the extent there is authority on that subject, it is to the effect that such approval is not generally necessary. *Railway Executives Ass'n* v. *Boston & Maine Corp.*, 639 F. Supp. 1092 (D.Me.), *modified on other grounds*, 808 F.2d 150 (1st Cir. 1986), *cert. denied*, 108 S. Ct. 102 (1987).

ALPA's argument that the protective steps otherwise proper under *Florida East Coast* must cease automatically and immediately upon termination of the strike that necessitates them, and that Eastern is seeking to justify continued violation of its contract, is answered by the language of *Florida East Coast* itself. If that case authorizes steps that are "reasonably necessary," then whether those steps may continue to have effects after the strike has ended, and if so for how long, itself should be determined by the standard of reasonable necessity. If the steps taken during a strike were reasonably necessary to assure continued operation, and they must inherently have effect beyond the duration of the strike, then *Florida East*

Coast would appear to authorize them even insofar as their effect extends beyond the duration of the strike.

Nor is ALPA's unclean hands argument persuasive. The RLA itself provides that a party's refusal to submit to arbitration "shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise." 45 U S.C. § 157, First. Moreover, as Eastern argues, *Florida East Coast* held that unclean hands would bar an order enjoining a strike, not temporary changes necessitated by the strike.

There is nothing to prevent the bankruptcy court from hearing and deciding the issues raised by Count V of Eastern's complaint. That Count seeks a declaration under *Florida East Coast* that Eastern's work rules changes, which were not the subject of any grievance or arbitration demand by ALPA, were "reasonably necessary." But there remains to be considered the question of whether the bankruptcy court's jurisdiction should override that of an arbitrator under the RLA and permit that court to decide the issues raised by Counts I through IV of Eastern's complaint, which have been the subject of grievances and arbitration demands.

V.

The dispute resolution procedures of the RLA, ending with final and binding arbitration, embody a strong policy in favor of arbitration and against litigation in court when the disputes arise out of interpretation of a collective bargaining agreement, as ALPA claims the disputes do here. That policy is justified by both the expertise of the arbitral tribunal and that tribunal's freedom from cumbersome procedures and appeals.

Union Pacific R. Co. v. *Sheehan*, 439 U.S. 89, 94 (1978), and cases cited therein. Although the RLA initially was created to deal with disputes in the railroad industry, it has been extended with certain modifications not here relevant to the airline industry, 45 U.S.C. § 181, and there is every reason to believe that the same justifications exist for the System Boards of Adjustment established for the airline industry, 45 U.S.C. § 184, as for the National Railroad Adjustment Board. 45 U.S.C. § 153, First. *See*, *Vaughter* v. *Eastern Air Lines, Inc.*, 619 F. Supp. 463, 467-69 (S.D. Fla. 1985), *aff'd* 817 F.2d 685 (11th Cir. 1987).

That strong policy in favor of arbitration, however, is not an end in itself. "The first declared purpose of the Railway Labor Act is 'To avoid any interruption to commerce or to the operation of any carrier engaged therein.'" *Slocum* v. *Delaware, Lackawanna & Western R. Co.*, 339 U.S. 239, 242 (1950), *quoting* 45 U.S.C. § 151a. The carrier in question in this case is now involved in a bankruptcy reorganization which, if not successful, will result in "interruption to commerce or to the operation of any carrier engaged therein" -- permanently. The disputes ALPA would arbitrate are "minor" disputes in the parlance of the RLA, because they grow out of interpretation of a collective bargaining agreement, 45 U.S.C. § 152, Sixth, as opposed to "major" disputes which involve disagreement in the attempt to change the terms of a collective bargaining agreement or in the bargaining process for a new contract. 45 U.S.C. § 152, Seventh; *Brotherhood of Trainmen* v. *Chicago River & Indiana R. Co.*, 353 U.S. 30, 32 (1957). But despite their diminutive nomenclature under the RLA, ALPA concedes that these disputes involve potentially staggering cost to Eastern. At oral argument ALPA's counsel agreed that the outcome of these disputes "will determine

whether or not any reorganization is possible at all," (12/28/89 Tr. 22) and that potential damages involve "astronomical sums." (*Id.* at 23) Nor did ALPA contest Eastern's claim that uncertainty surrounding this dispute has inhibited Eastern from presenting a plan of reorganization; indeed, ALPA endorsed that claim. (*Id.* at 22-23)

In such circumstances, one of the advantages of arbitration when the employer is not in reorganization -- finality -- becomes a potentially devastating disadvantage. The only bases for review of arbitral decisions under the RLA are failure to comply with the requirements of the RLA, failure of the arbitral board to conform, or to confine itself to matters within the scope of its jurisdiction, and fraud or corruption. *Sheehan*, 439 U.S. at 93. No arbitrator can possibly be as aware as the bankruptcy judge supervising Eastern's reorganization of how that reorganization will be affected by an arbitral ruling. That presents the distinct possibility that even if ALPA prevailed at an arbitration it could find itself with an irreversible triumph over a carrier that then cannot be successfully reorganized -- precisely the Pyrrhic victory ALPA said at oral argument it wishes to avoid. (12/28/89 Tr. 33)

The other advantage of arbitration -- the familiarity of the arbitrator with the customs and usages of the industry -- is one that need not be lost entirely even if the underlying issues are decided in the Bankruptcy Court. There is no reason why ALPA could not find a way to submit to the Bankruptcy Court the arbitrator's views on any or all the issues in Eastern's complaint, assuming it wished to do so, particularly when there is only one arbitrator involved.

The union places substantial reliance on *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561 (1946), where the Supreme Court held that the bankruptcy court overseeing a railroad reorganization was obligated to refer to the Adjustment Board a jurisdictional dispute between two unions growing out of a disagreement as to the meaning of a collective bargaining agreement. *Pitney*, however, involved two elements not present here. First, because that case was a railroad reorganization it was controlled by the predecessor to 11 U.S.C. § 1167, which forbids the bankruptcy court to make any change in wages or working conditions "established by a collective bargaining agreement that is subject to the Railway Labor Act except in accordance with section 6 of such Act," *i.e.*, 45 U.S.C. § 156, which contains dispute resolution procedures. Section 1167, however, applies only to railroad reorganizations, not to airline reorganizations. 11 U.S.C. § 103(g); *Air Florida Pilots Ass'n* v. *Air Florida. Inc.*, 12 CBC 2d 661, 665 (Bankr. S.D.Fla. 1985). Second, the underlying dispute in *Pitney* was a jurisdictional dispute between two unions as to whose members would serve as conductors on trains within the railroad yard. Such a dispute could not threaten the reorganization of the debtor unless it continued and caused a strike or other disruption; its resolution either way could not cause such a threat, or indeed any economic threat. *Cf.*, *In re Marine pollution Service. Inc.*, 89 B.R. 344, 346 (S.D.N.Y.), *rev'd on other grounds*, 857 F.2d 91 (2d Cir. 1988). Here, by contrast, the economic stakes are enormous and bid fair to threaten Eastern's continued viability.

* * *

Appendix-A Opinion and Order of the United States District Court Southern District of New York

For the above reasons, the Bankruptcy Court should be free to decide all the remaining issues raised Eastern's complaint.

To recapitulate, ALPA's motion to withdraw is granted only insofar as questions of law are discussed and decided herein,[4] the motion to transfer is denied, and following such withdrawal the remainder of the proceeding is remanded to the Bankruptcy Court for decision.

SO ORDERED:

/s/ Michael B. Mukasey
Michael B. Mukasey,
U.S. District Judge

Dated: New York, New York
January 24, 1990

4. The matters treated in this opinion relate to ALPA's motion for mandatory withdrawal. ALPA has offered no reason for this Court as a matter of discretion to decide any issue raised in Eastern's complaint.

APPENDIX B

Opinion and Order of the United States District Court Southern District of New York

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

90 Civ. 0243 (MBM)

In re: Case Nos. 89 B 10448 (BRL)
89 B 10449 (BRL)

IONOSPHERE CLUBS, INC. and
EASTERN AIRLINES, INC.,

Debtors.

EASTERN AIRLINES, INC.,

Plaintiff,

-against-

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, EASTERN AIR LINE MASTER EXECUTIVE COUNCIL,

Defendant.

ADV. PRO. No. 90-5004A

Appendix-B Opinion and Order of the United States District Court Southern District of New York

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Opinion and Order of the Court

MICHAEL B. MUKASEY, U.S.D.J.

The Air Line Pilots Association, International ("ALPA"), after prevailing in an arbitration under the Railway Labor Act ("RLA") against Eastern Airlines, a debtor in possession under Chapter 11 of the Bankruptcy Code, sought to "confirm" the arbitral award by filing an action in the U.S. District Court for the Southern District of Florida. Eastern responded with an adversary proceeding in the Bankruptcy Court seeking (i) a declaration that ALPA's Florida action violated the automatic stay provisions of the Code, and (ii) an injunction barring further prosecution of that action.

Appendix-B Opinion and Order of the United States District Court Southern District of New York

ALPA now moves to withdraw Eastern's adversary proceeding from the Bankruptcy Court to the District Court pursuant to 28 U.S.C. § 157(d), which permits a bankruptcy court proceeding to be withdrawn to the district court "in whole or in part . . . for cause shown," and requires such withdrawal "if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce." ALPA also seeks to transfer the withdrawn proceeding to the Southern District of Florida under 28 U.S.C. § 1404(a), which authorizes transfer of a case "[f]or the convenience of parties and witnesses, in the interest of justice . . . to any other district . . . where it might have been brought."

As set forth below, ALPA's motion to withdraw is denied. There is no reason to consider the transfer motion.

I

This proceeding adds a few more loops and knots to the tangled skein of labor proceedings between Eastern and ALPA that preceded, to some extent precipitated, and then followed Eastern's Chapter 11 filing on March 9, 1989. See, *e.g.*, *Air Line Pilots Ass'n Internat'l* v. *Eastern Air Lines. Inc.*, Nos. 89 Civ. 6989 and 7563 (RWS) (S.D.N.Y. April 9, 1990) slip op. 4-19, *Eastern Airlines, Inc.* v. *Air Line Pilots Ass'n Internat'l*, No. 89 Civ. 8250 (MBM) (S.D.N.Y. Jan. 24, 1990) slip op. 2-10. ("*Eastern* v. *ALPA*") ALPA represents certain current and former Eastern pilots. At the time of the Chapter 11 filing, ALPA was trying to drag Eastern before a panel of RLA arbitrators to resolve what was known as Case No. 5-86, in which ALPA charged that Eastern had violated pay parity

provisions when it failed to raise pilots' pay by the same percentages it had applied to raise the pay of employees represented by the International Association of Machinists ("IAM"). ALPA had been pressing the case, and Eastern resisting it, since 1986.

ALPA, acting out of what it now describes as "reasons of expediency" (Linsey Aff. 1/19/90 ¶ 16), moved in the Bankruptcy Court on July 10, 1989 for relief from the automatic stay imposed by 11 U.S.C. § 362[1] to allow Case No. 5-86 to proceed. On August 2, 1989, the Bankruptcy Court granted that relief, *In re Ionosphere Clubs, Inc.*, 105 B.R. 761 (Bankr. S.D.N.Y. 1989), and the case proceeded. On October 31, 1989, the System Board of Adjustment, established as the arbitral tribunal under the RLA, 45 U.S.C. § 184, handed down a decision that both parties regard as favorable to ALPA. (Linsey Aff. 1/19/90 Exh. 15)

On November 22, 1989 ALPA filed an action in the Southern District of Florida seeking an order confirming the arbitral award, a declaratory judgment including a computation of amounts payable under the award, and attorneys' fees and costs as compensation for Eastern's long-term resistance to the RLA arbitration. Acting out of what it suggests was a concern for Eastern's Chapter 11 status, ALPA stopped short of seeking to compel Eastern to disburse back pay. (Linsey Aff. 1/19/90 Exh. 17 and ¶ 21) Eastern responded on January

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1. That section provides in relevant part that a debtor's petition "operates as a stay . . . of -- (1) the . . . continuation . . . of . . . [an] administrative . . . proceeding against the debtor that was or could have been commenced before the commencement of the case under this title . . . ."

4, 1990 by filing an adversary proceeding in the Bankruptcy Court seeking (i) a declaration that ALPA's Florida action violated the automatic stay, (ii) an injunction ending the Florida action and preventing any further such action, and (iii) a finding that the arbitral award had exceeded the System Adjustment Board's jurisdiction in that it compelled parity with IAM pay raises allegedly beyond those submitted for arbitration. (Linsey Aff. 1/19/90 Exh. 16 at ¶ 4) ALPA seeks here to withdraw and transfer that proceeding.

II

ALPA perceives two issues that compel withdrawal under 28 U.S.C. § 157(d). One is whether its Florida action may be enjoined consistent with the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. § 104 and 107; the other is whether a court may determine what ALPA styles issues of "procedural arbitrability" under the RLA. To the extent ALPA relies on a view of the statute that would apply it broadly to any controversy calling for the straightforward application of a statute outside Title 11, I adhere to the views expressed in *Eastern* v. *ALPA*, *supra*, slip op. at 10-12, based on the authority there cited as well as Judge Sweet's opinion in *O'Connell* v. *Terranova*, No. 89 Civ. 7203 (RWS) slip op. at 2-5 (S.D.N.Y. March 21, 1990).

The first of ALPA's arguments for withdrawal is covered by my January 24, 1990 opinion in *Eastern* v. *ALPA*, slip op. at 15-17, which dealt with whether the prospect of an injunction against an RLA-mandated arbitration required withdrawal. That decision applies *mutatis mutandis* to the Florida court action here. To the extent that the Fourth Circuit's opinion in *District 29, United Mine Workers* v. *New Beckley Mining Corp.*,

895 F.2d 942 (4th Cir. 1990) differs from my earlier decision and the authority there relied on, I respectfully decline to follow it and believe that Judge Sprouse's dissent at 895 F.2d 947-49 expresses the better view.

The second issue ALPA perceives to justify withdrawal is a mirage, perhaps of its own creation and perhaps of Eastern's but in any event illusory and insufficient to justify withdrawal. ALPA argues that the question of whether the arbitrators exceeded their jurisdiction, which Eastern has raised in its Bankruptcy Court complaint, involves "procedural arbitrability," and must be decided by the arbitrators themselves and not by a court, and that Eastern is engaged in an unprecedented attempt to have a court decide it, which presents a novel issue under the RLA. As noted in *Eastern* v. *ALPA*, *supra*, slip op. at 22-23, arbitral decisions under the RLA are subject to court review by the terms of the statute itself, 45 U.S.C. § 153 First (q), *inter alia* for "failure of the Adjustment Board to conform, or confine, itself to matters within the scope of its jurisdiction . . . ." *Union Pacific R. Co.* v. *Sheehan*, 439 U.S. 89, 93 (1978), *reh'g denied* 439 U.S. 1135 (1979). With the statute to provide guidance, there is no need to explore such an otherwise intriguing concept as procedural versus substantive arbitrability. *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 555-56 (1964).

Moreover, as the Supreme Court made clear and explicit in *Sheehan* and elsewhere, the statutory segment quoted above is one of "three limited categories of review provided for in the Railway Labor Act." *Sheehan* at 93. That being so, the Bankruptcy Court's task will be limited to deciding what may fairly be characterized as an issue of law, *id.*, which will

receive plenary review on appeal. *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 193 (1963).

When all of the above facts are considered, it would appear that the best of all possible results from everyone's standpoint is to permit this matter to proceed in the Bankruptcy Court. That Court is in the best position to determine how much leeway it granted ALPA when it agreed to lift the stay and permit Case No. 5-86 to proceed. Moreover, any decision about whether the arbitrators exceeded their authority will require only straightforward application of the statutory standards of the RLA, which have been explicated and applied frequently, and will be fully reviewable on appeal.

These facts and issues do not justify either a mandatory or a discretionary withdrawal of Eastern's adversary proceeding from the Bankruptcy Court. Accordingly, ALPA's motion to withdraw is denied and its motion to transfer is dismissed as moot.

SO ORDERED:

/s/ Michael B. Mukasey
Michael B. Mukasey,
U.S. District Judge

Dated: New York, New York
April 30, 1990

APPENDIX C

Opinion and Order of the United States District Court Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M-47

In re

FINANCIAL NEWS NETWORK, INC.,

Debtor.

Appeal of

DOW JONES/GROUP W TELEVISION COMPANY, DOW JONES & COMPANY, INC. and WESTINGHOUSE BROADCASTING COMPANY, INC.

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Appendix-C Opinion and Order of the United States District Court Southern District of New York

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Appendix-C Opinion and Order of the United States District Court Southern District of New York

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Appendix-C Opinion and Order of the United States District Court Southern District of New York

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Appendix-C Opinion and Order of the United States District Court Southern District of New York

LASKER, D.J.

These are expedited appeals from a decision reached by the Bankruptcy Court for the Southern District of New York on April 3, 1991 in the Chapter 11 proceedings of Financial News Network, Inc. ("FNN"). *In re Financial News Network, Inc.*, 91 B 10891 (FGC).

The Bankruptcy Court ruled orally on that date that any antitrust objections or actions by the Federal Trade Commission (FTC) or state agencies to bar the proposed acquisition of FNN must be brought before the Bankruptcy Court. That ruling is appealed by the FTC, the Commonwealth of Pennsylvania and the State of Delaware, acting for themselves and thirteen other states (collectively the "States"). The appeals are opposed by the Consumer News and Business Channel partnership (CNBC) and by FNN.[1]

The court's ruling was formally entered by the Bankruptcy Court in an Order and Judgment dated April 16. Oral argument on the appeal was heard on April 16 shortly before entry of the formal order, and was based on the Bankruptcy Court's extensive comments made in connection with its April 3 rulings.

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1. At the April 3 proceeding, the Bankruptcy Court also ruled that the bid of Dow Jones/Group W for FNN's assets would not be considered as a qualified bid because it failed to comply with the court's requirement that all bids conform to the terms of an offer previously submitted by CNBC in all respects other than price. That decision was also appealed (by Dow and by FNN's creditors) and argued at the same proceeding as the FTC's appeal. The court's refusal to consider Dow's bid is treated in a separate opinion dated April 17, 1991.

Appendix-C Opinion and Order of the United States District Court Southern District of New York

For the reasons discussed below, the Bankruptcy Court's ruling as to its jurisdiction is affirmed.

I.

Because there is no significant dispute as to the facts underlying the decision below or its appeal, and because of the time constraints governing resolution of the appeal, this opinion assumes familiarity with that background and provides no discussion of those facts beyond those needed to support particular conclusions.

The standard of review on this appeal, as on any appeal from the decision of a Bankruptcy Judge, is that the factual determinations below are binding unless clearly erroneous, while conclusions of law are reviewable *de novo*. *See In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 988-89 (2d Cir. 1990).

II.

The question giving rise to this appeal is the disposition of assets of the debtor FNN, which has been operating under Chapter 11 of the Bankruptcy Code since March 1, 1991. Two bids for those assets were presented to the Bankruptcy Court, one by a partnership known as Dow Jones/Group W ("Dow"), the other by CNBC, which now is FNN's sole competitor in the cable television business news industry. The Court ruled that Dow's bid did not comply with its announced rules governing bids for FNN, and therefore refused to consider Dow's bid and accepted CNBC's bid.

The instant appeals challenge the Bankruptcy Court's ruling that "any entity seeking to enjoin the consummation of the

transactions approved herein based upon matters that have been solely before this court must commence such action in this Court; *provided, however*, that such commencement shall be without prejudice to the rights afforded pursuant to 28 U.S.C. § 157(d)." Order and Judgment ¶ V (emphasis in original). The court's ruling was based in its finding that "any attempt to enjoin the transactions contemplated by the Motion and the Agreement in any other court [] would violate the automatic stay extant pursuant to section 362(a) of the Bankruptcy Code." Order and Judgment ¶ 3.

The FTC argues that the automatic stay provision of 11 U.S.C. § 362(a) cannot reach the FTC's authority to seek to enjoin contemplated mergers. It notes that 11 U.S.C. § 362(a) provides for stays of actions against the debtor in bankruptcy court, while its action would instead be brought against the acquiring entity, in this case CNBC. As to section 362(a)(3)'s stay of actions regarding control of the debtor, FTC argues that that provision has been construed to apply solely to creditor claims against the debtor's assets. FTC additionally argues that section 362(b)(4) exempts regulatory actions from the automatic stay provisions of section 362(a). Finally, FTC argues that it never submitted to the bankruptcy court's jurisdiction by appearing before it, but rather appeared for the sole purpose of seeking an extension of time for its review of the proposed merger pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Section 7A of the Clayton Act, 15 U.S.C. § 18a.

CNBC, which filed extensive papers opposing the motions of the FTC and the states, contends that the appeal is premature because it preceded entry of a written order implementing the court's rulings of April 3. As is discussed

more fully in our opinion addressing the exclusion of Dow's bid from consideration, however, this objection fails for two reasons. First, the court's determination was sufficiently final, explicit and detailed to permit meaningful review, particularly in light of precedent favoring flexible application of the finality requirement in bankruptcy appeals. *See In re Johns-Manville Corp.*, 920 F.2d 121, 126 (2d Cir. 1990) ("The finality requirement is less rigidly applied in bankruptcy than in ordinary civil litigation, and 'orders in bankruptcy cases may be immediately appealed if they finally dispose of discrete disputes within the larger case'"). Second, a written order was in fact entered within hours of argument of the appeal. The written order has been provided to the court, and neither our review of it nor any communication from the parties suggests it contains anything that would alter the substance of the April 16 argument or of this court's opinion. Indeed, in its Order of April 16, the court stated: "This order is entered to ensure that any party contemplating an appeal, even if interlocutory, will have an order to appeal from." Order and Judgment ¶ 2. Accordingly, the filing of the Order moots CNBC's objection as to the finality of the judgment being appealed.

As to the merits, the parties have presented extensive arguments on the important question of the intersection of the Bankruptcy Court's jurisdiction over matters affecting disposition of the debtor's estate and the FTC's statutory authority to enforce the nation's antitrust laws in the forum of its choice, as well as the States' independent authority to enforce their antitrust laws.[2] However, that issue need not be

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2. The parties do not contest the Bankruptcy Court's competence to hear antitrust matters related to pending bankruptcy cases. The Bankruptcy (continued...)

reached because the Bankruptcy Court found that both the FTC and the States have, through their extensive involvement in the proceedings below, submitted themselves to the jurisdiction of the Bankruptcy Court for purposes of this case, and that finding is at a minimum not clearly erroneous. While the FTC contends that its sole appearance before the Bankruptcy Court was for the limited purpose of seeking an extension of time to complete its review pursuant to the Hart-Scott-Rodino Act, in fact its involvement was far more pervasive, as was that of the States.

The Bankruptcy Code provides that when disposition of the debtor's assets requires notification under the Hart-Scott-Rodino Act,

> (A) notwithstanding subsection (a) of such section, such notification shall be given by the trustee; and
>
> (B) notwithstanding subsection (b) of such section, the required waiting period shall end on the tenth day of the receipt of such notification, unless the court, after notice and hearing, orders otherwise.

11 U.S.C. § 363(b)(2). Thus the FTC was obliged to appear before the Bankruptcy Court in order to obtain any extension of the ten-day Hart-Scott-Rodino review period. An

---

2. (...continued)
Court's authority to hear such cases derives from 28 U.S.C. § 157(a) (authorizing the reference of cases under the Bankruptcy Code and related proceedings to bankruptcy judges) and § 157(b)(2)(O) (Defining core proceedings to include "proceedings affecting the liquidation of the assets of the estate . . .").

appearance for the sole purpose of obtaining an extension on the review period may not constitute a consent to the Bankruptcy Court's jurisdiction over any antitrust challenge that may ultimately result from the FTC's review.

However, the FTC in its actual appearances did more than merely request an extension.

On March 14, the FTC requested that the Bankruptcy Court withhold approval of the Motion and Agreement until twenty days after FNN and CNBC provided additional information to FTC concerning the proposed merger. FTC indicated that it would advise the court as to its findings. At a March 27 hearing on FNN's "Emergency Motion" seeking to advance the auction date of FNN's operations to April 3, FTC made an appearance to oppose that motion. Finally, at the April 3 hearing and auction the FTC appeared again and participated in discussion of the auction's conduct.

The States similarly played a substantial role in the proceedings below, and thereby submitted themselves to the Bankruptcy Court's jurisdiction. On March 25 the States filed an objection to the proposed sale to CNBC, arguing that the sale likely would violate antitrust laws and requesting the Bankruptcy Court to disapprove the sale to CNBC and to refuse to consider any bid from CNBC at a future auction of FNN's assets. The States further urged that the court insist that the ultimate purchaser of FNN operate the business separately from CNBC. Again on March 27, the States opposed by letter an FNN's "Emergency Motion" to advance the auction of its broadcast operations to April 3. And at the April 3 auction the States voiced their continued objections to the CNBC bid, maintaining that because of the substantial

likelihood of antitrust liability resulting from CNBC's possible acquisition of FNN, CNBC's was not the "highest and best bid" before the court.

The extent of participation by the FTC and the States was noted by the Bankruptcy Court, which found that through their participation they "have consented to the jurisdiction of this Court to consider the Motion and all matters relating thereto, including, without limitation, any attempts to enjoin or otherwise interfere with the Closing . . . ." Order and Judgment ¶ 52.

The bankruptcy court is legally competent to resolve antitrust issues raised by proceedings before it, and has entertained throughout those proceedings the comments of the FTC and the States. While those entities now protest that they never consented to the Bankruptcy Court's jurisdiction over their claims, by their earlier appearances they in fact attempted to prevent the Court's award of FNN to CNBC, and based their objections on antitrust concerns arising from their investigation of the proposed merger. Only upon an unfavorable ruling below did they seek to disassociate themselves with the pending bankruptcy proceedings.

It is unnecessary, in the circumstances of this case, to determine whether a mere appearance before a Bankruptcy Court to seek an extension of time for review pursuant to the Hart-Scott-Rodino Act would subject the FTC to the exclusive jurisdiction of that court. Today's ruling is based on the specific facts of this case, in which the FTC and the States each attempted to influence the proceedings by presenting antitrust objections to the Bankruptcy Court. The court below rightly noted that the FTC and the States retain the ability to

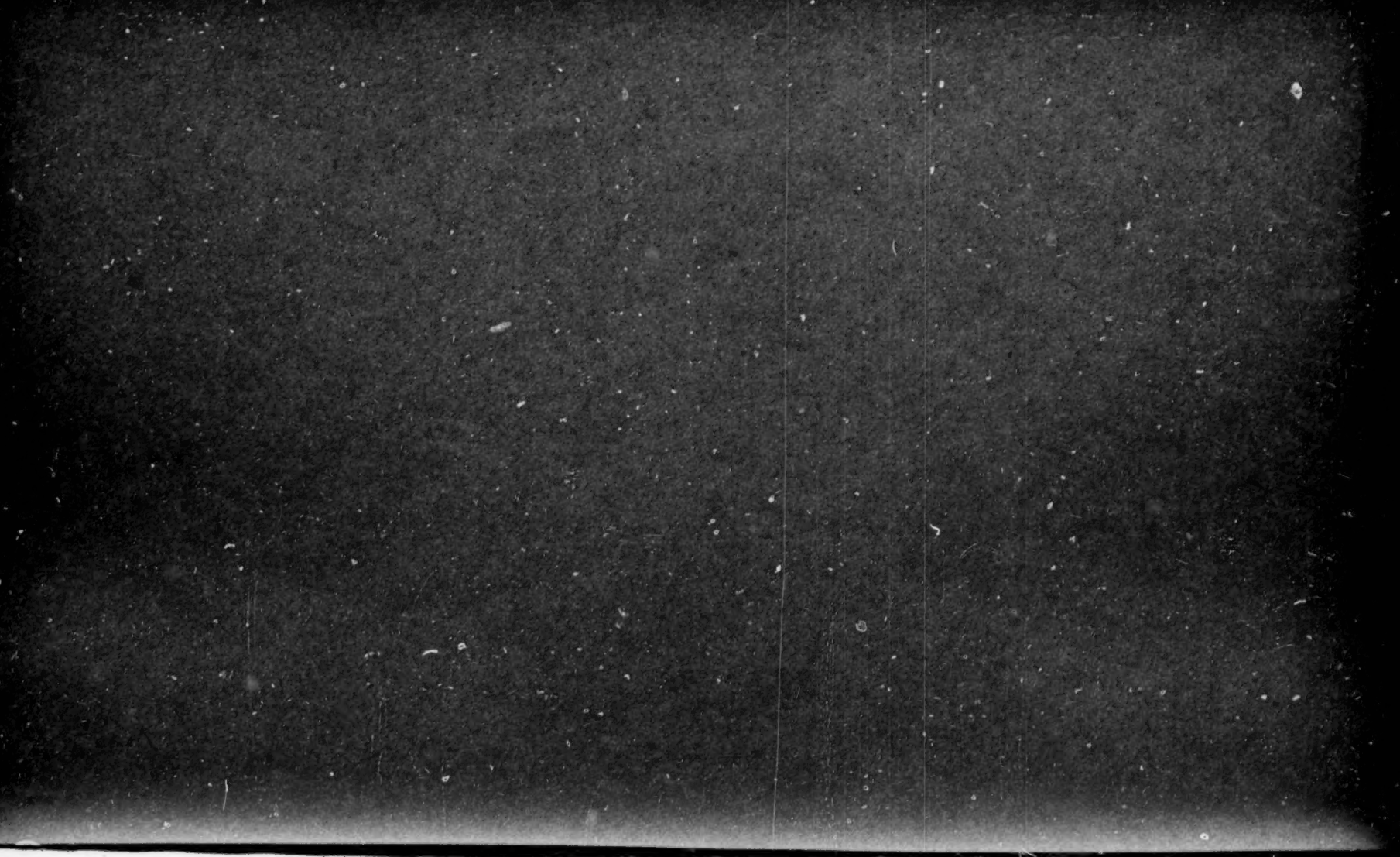
seek withdrawal of the reference either of the entire proceeding or its antitrust components to the District Court. Once these entities have submitted to the court's jurisdiction, that is their sole remedy.

This result is consistent with the purpose of allowing the Bankruptcy Court broad jurisdiction over matters concerning the disposition of the debtor's assets. It is not contrary to public opinion granting antitrust enforcement agencies discretion over the forum in which to seek relief because if the sale is consummated the FTC and the States retain the ability to sue in the forum of their choice to bring about divestiture.

The ruling of the Bankruptcy Court is affirmed.

Dated: New York, New York
April 18, 1991

/s/ Morris E. Lasker
Morris E. Lasker,
U.S. District Judge



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No. 90-1482

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

IN RE: IONOSPHERE CLUBS, INC. and EASTERN AIR LINES, INC.,
Debtors.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AFL-CIO,
Petitioner,

v.

MARTIN R. SHUGRUE, JR., as Chapter 11 Trustee for EASTERN AIR LINES, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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IN THE

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**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Instead of responding to the issues raised in ALPA's petition ("Pet."), Eastern's brief in opposition ("Opp. Br.") raises frivolous arguments that the petition is premature and moot, and then attempts to convert fundamental questions concerning bankruptcy court jurisdiction into a matter of venue. Eastern's brief in opposition offers nothing to undercut the compelling grounds for granting the petition.

A. Eastern argues that a writ of certiorari should be denied because the decision of the court of appeals, which remanded certain issues, did not end the litigation brought

by Eastern to enjoin ALPA's district court lawsuit. Opp. Br. at 9. This argument is without basis. In *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947), this Court held that review of a non-final decision by a court of appeals is appropriate so long as the decision "involved an issue 'fundamental to the further conduct of the case'" (quoting *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945)). Here, the question of jurisdiction is fundamental: absent the decision of the court of appeals that the bankruptcy court had the jurisdiction to determine the wet-leasing action, the bankruptcy court's order would have been reversed as a matter of law, and the litigation would have terminated. Similarly, if this Court issues a writ of certiorari and reverses the court of appeals, the Court's decision will end the litigation brought by Eastern in the bankruptcy court.[1]

The authorities cited by Eastern do not support its strained position that this Court should not review the decision below. While Eastern cites the sole dissenting opinion in *Estelle* v. *Gamble*, 429 U.S. 97 (1976), Opp. Br. at 8 n.5, the majority in that case determined to review a non-final decision by the court of appeals. *See* 429 U.S. at 98.[2] The other authorities relied upon by Eastern, *see, e.g., American Constr. Co.* v. *Jacksonville*,

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[1] Indeed, the district court in New York, on stipulation of the parties, has postponed proceedings on the remanded issues in light of the pending petition for certiorari.

[2] Similarly misplaced is Eastern's citation of Supreme Court Rule 11. Opp. Br. at 8 n.4. That Rule, based on 28 U.S.C. § 2101(e), applies only to cases where the court of appeals has not issued *any* ruling, not even an interlocutory one. The rule provides, however, that review may be appropriate even in those cases. *See, e.g., United States* v. *Nixon*, 418 U.S. 683, 686-87, 687 n.1 (1974). The general policy against review of interlocutory orders cited by Eastern, *see* Opp. Br. at 8-9, relates to a statute directed specifically at courts of appeal. *See In re King Memorial Hospital, Inc.*, 767 F.2d 1508, 1510 (11th Cir. 1985); 28 U.S.C. §§ 1291, 1292. There is no analogous statute restricting interlocutory review by this Court.

Tampa & Key West Co., 148 U.S. 372 (1893), Opp. Br. at 8, are clearly contrary to the Court's current practice of granting a writ of certiorari to review an interlocutory decision where, as here, review is appropriate. *See, e.g., Air Line Pilots Ass'n, Int'l* v. *O'Neill*, 111 S. Ct. 1127, 1133 (1991); *Begier* v. *IRS*, 110 S. Ct. 2258 (1990), *affirming* 878 F.2d 762 (3d Cir. 1989).

B. Eastern asserts that the order below has been rendered moot by Eastern's termination of its wet-leases and cessation of operations.[3] Opp. Br. at 10-17. Eastern concedes, however, that ALPA's district court lawsuit, which was the subject of the bankruptcy court injunction affirmed below, sought the recovery of damages, as well as other relief, based on a violation of the Railway Labor Act. Opp. Br. at 14. Eastern, despite the termination of the wet-leasing, did not raise a question of mootness in the courts below. Eastern's suggestion of mootness in this Court is frivolous. This Court has repeatedly held that a controversy is not moot, even if injunctive or other relief is no longer available, as long a claim for damages remains at issue. *City of Richmond* v. *J.A. Crosson Co.*, 488 U.S. 469 (1989); *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1, 8-9 (1978); *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 154, n.3 (1978); *cf. Powell* v. *McCormack*, 395 U.S. 486, 496-500 (1969).[4]

C. The petition does not seek to have the Court address an issue of venue. Rather, as already demonstrated (Pet. 20-21, 25-28), the power of the bankruptcy court to decide, as a matter of first instance, cases arising exclu-

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[3] Eastern never attempts to explain the relevance of its cessation of operations, since the wet-leasing had terminated long before the cessation of operations.

[4] The validity of ALPA's cause of action and the calculation of the amount of damages owed is, as argued in our petition for certiorari, a matter for the district court. What percent of the damages award is eventually paid might be determined in the bankruptcy court, along with all of Eastern's other liabilities, pursuant to a reorganization plan.

sively under non-bankruptcy law concerns the jurisdiction —and not the venue—of Article I bankruptcy courts pursuant to 28 U.S.C. § 157 and the U.S. Constitution.

Indeed, in *Northern Pipeline Constr. Co.* v. *Marathon Pipeline Co.*, 458 U.S. 50 (1982), this Court held that the then existing Bankruptcy Code violated Article III of the Constitution by granting essential judicial functions to tribunals lacking the constitutional assurances necessary to an independent judiciary. Congress responded by enacting Section 157 of the Judiciary Act. 28 U.S.C. § 157. Section 157 sharply circumscribes the jurisdiction of bankruptcy courts to decide non-bankruptcy law issues. In subsections (b) and (c), Congress limited the universe of proceedings in which bankruptcy courts could issue final orders. *See* 28 U.S.C. §§ 157(b) and (c). In subsection (d), Congress ensured that the bankruptcy court functions as a specialized adjunct of the district courts by *requiring* district courts to withdraw the reference of adversary procedings requiring consideration of non-bankruptcy federal law. *See* 28 U.S.C. § 157(d).

The Second Circuit erroneously interpreted Section 157 and returned to the bankruptcy courts the broad grant of jurisdiction which Congress plainly intended to curtail in light of this Court's decision in *Marathon*. *See* Pet. at 23-24, 26-28. The petition seeks review of the Second Circuit's decision because it conflicts with decisions in other circuits and denies ALPA the fundamental right to have the wet-lease dispute heard by an Article III court. Thus, contrary to Eastern's claim, the overriding issue raised in the petition is whether Congress vested bankruptcy courts with the *jurisdiction* to decide pure non-bankruptcy issues. Try as it may, Eastern does not and cannot demonstrate that "ALPA is seeking a writ of *certiorari* merely to have the Court address an issue of venue." Opp. Br. at 18.[5]

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[5] For many years, ALPA and Eastern have litigated various issues in the Southern District of Florida, where Eastern's head-

D. Eastern's minimal review of the substantive issues raised by ALPA only demonstrates the appropriateness of granting the petition.

1. Eastern asserts that the Second Circuit's interpretation of a "core" proceeding below and in *In re Ben Cooper*, 896 F.2d 1394 (2d Cir.), *vacated*, 111 S. Ct. 425 (1990), does not conflict with the formulation in *In re Wood*, 825 F.2d 90 (5th Cir. 1987) and its progeny. However, Eastern offers no analysis and does not even review or mention the standards.[6] It also ignores that this Court previously granted a writ of certiorari in *Ben Cooper*, 110 S. Ct. 3236, *vacated*, 111 S. Ct. 425 (1990). The conflict amongst the courts of appeals is clear.

Eastern, in another argument frivolously raised for the first time in this Court, suggests that the "core" proceeding issue is irrelevant because ALPA "submitted itself" to the jurisdiction of the bankruptcy court. Opp. Br. at 21-22. Participation in various bankruptcy proceedings cannot constitute consent to have all causes of action, brought in whatever forum, adjudicated as a core proceeding in the bankruptcy court, and Eastern

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quarters are located. *See* Pet. at 3-4 n.3 and 4; Opp. Br. at 17. Eastern did not file its Chapter 11 Petition in the Southern District of Florida. Instead an affiliate of Eastern, Ionosphere Clubs, Inc., filed a petition in the Southern District of New York on May 9, 1989, and Eastern filed there later that day.

[6] While Eastern does note that *Wood* involved a state law claim, Opp. Br. at 23, it ignores that *Wood* has been followed by other courts of appeal in cases involving claims arising under federal law. Pet. at 22.

Eastern also appears to formulate a new theory of "core" proceedings. Eastern asserts that the labor law dispute involved in ALPA's wet-lease lawsuit is a core proceeding because the flying at issue was "core" to Eastern's operations. Opp. Br. at 23. "Core" issues under Section 157 refer to issues at the "core of restructuring debtor-creditor relations," *Marathon*, 458 U.S. at 71, not to the "core" of a debtor's operations.

submits no authority for that preposterous suggestion.[7] The wet-lease lawsuit is not a core proceeding, and ALPA has so asserted ever since the bankruptcy court unilaterally determined that it could and would determine the merits of a wet-lease lawsuit that was not before it.[8]

2. The Second Circuit's consideration of Section 157(d), which provides for withdrawal of the reference to the district court, certainly was relevant. ALPA initially filed a district court lawsuit alleging violations of federal labor law. If such a lawsuit had initially been filed in the bankruptcy court it would have been subject to a mandatory withdrawal of the reference to the district court. Pet. at 26-29. It would violate congressional intent and the entire structure of bankruptcy jurisdiction enacted in reaction to *Marathon* for a bankruptcy court to enjoin a non-bankruptcy federal cause of action, which would have been subject to a mandatory withdrawal of the reference, in circumstances where the lawsuit was initially brought in district court.[9]

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[7] Eastern's complaint in the bankruptcy court sought relief only pursuant to Bankruptcy Code sections 362 and 105 to enjoin ALPA's wet-lease lawsuit. The automatic stay, on its face, bars the continuation of litigation in any forum, with no explicit exception for the bankruptcy court. The bankruptcy court determined, without request or notice, the merits of issues under the Railway Labor Act raised in the wet-lease lawsuit. ALPA thereafter appealed to the district court and argued that the bankruptcy court had improperly reached the merits of the RLA issues and thereby improperly determined the merits of a "non-core" matter. ALPA Brief to the District Court at 40-42.

[8] Unlike all the cases cited by Eastern, Opp. Br. at 22 n.9, ALPA filed a district court lawsuit raising non-bankruptcy issues, and appeared in the bankruptcy court on those issues only to the extent of opposing the grant of injunctive relief against that lawsuit. ALPA's proof of claim, while not relevant in these circumstances to the question of "core" power over a non-bankruptcy federal cause of action, did not cover the wet-lease lawsuit.

[9] The question of whether ALPA moved for a withdrawal of the reference is irrelevant. As noted *supra*, n.7, only questions

3. Finally, Eastern attempts to reconcile the application in this case of Bankruptcy Code section 362 with section 1113, emphasizing the need for a close reading of section 1113's language. Opp. Br. at 27-30. The language of section 1113, however, unmistakably indicates a Congressional intent to override other Code sections that might be interpreted to interfere with enforcement of a collective bargaining agreement: "No provision of [the Code] shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of [section 1113]." 11 U.S.C. § 1113(f). Section 1113, the more recently enacted statute, must prevail in any conflict with Section 362. The main purposes of the automatic stay are to give debtors a "breathing spell" and to prevent one creditor from having its rights adjudicated before another creditor. *See* Sen. Rep. No. 95-989, 95th Cong., 2d Sess. 49, 54 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5835, 5840. As ALPA demonstrated in its petition, centralization of disputes *per se* is not a goal of the automatic stay. Pet. at 16-17. To the extent centralization is considered a goal, it cannot supersede the limits on bankruptcy court jurisdiction contained in section 157 or the clear language of section 1113.

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under Section 362 and 105 were raised by Eastern's lawsuit in the bankruptcy court. After the bankruptcy court determined the merits of the RLA issues, ALPA raised on appeal to the district court that if the labor law issues had been before the bankruptcy court the lawsuit would have been subject to a mandatory withdrawal of the reference. ALPA Reply Brief in the District Court at 18-19.

CONCLUSION

For the reasons stated above and in the certiorari petition, a writ of certiorari should be granted.

Respectfully submitted,

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No. 90-1482

In the Supreme Court of the United States

OCTOBER TERM, 1991

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AFL-CIO, PETITIONER

v.

MARTIN R. SHUGRUE, JR., CHAPTER 11 TRUSTEE FOR EASTERN AIR LINES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Section 1113 of the Bankruptcy Code, 11 U.S.C. 1113, provides the exclusive means for a debtor to terminate or modify a collective bargaining agreement. The question presented in this case is whether Section 1113 prohibits a bankruptcy court from staying, under 11 U.S.C. 362(a), an action in another court brought by a labor union to enforce the terms of a collective bargaining agreement.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to this Court's order of May 13, 1991, inviting the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. On March 4, 1989, the Air Line Pilots Association International (pilots' union) and two other unions began a strike against Eastern Airlines, Inc. (Eastern). Pet. App. 88a. On March 9, 1989, Eastern and its affiliate, Ionosphere Clubs, Inc., filed voluntary petitions under Chapter 11 of the Bankruptcy Code in the United States District Court for the

Southern District of New York. *Ibid.* To meet published flight schedules, Eastern leased aircraft and crews from Continental Airlines. Pet. App. 89a.[1] Such lease arrangements are known in the airline industry as "wet-leases." *Ibid.*

In September 1989, the pilots' union filed a complaint against Eastern in the United States District Court for the Southern District of Florida. The complaint alleged that the wet-leases violated the terms of the collective bargaining agreement between Eastern and the pilots' union. Pet. App. 89a-90a. As relief, the complaint sought an injunction against Eastern's continued use of wet-leases and damages for Eastern's breach of the contract. *Id.* at 40a-41a.

In response, Eastern brought an action in the bankruptcy court to enjoin the pilots' union from prosecuting its action in the Southern District of Florida. Eastern argued that the Florida action violated the automatic bankruptcy stay of 11 U.S.C. 362(a).[2] Pet. App. 90a-91a.

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[1] At that time, the estate was operated by the debtor-in-possession. See 11 U.S.C. 1107(a). On April 19, 1990, Martin R. Shugrue, Jr., was appointed trustee of the bankruptcy estate.

[2] Section 362(a) limits the types of actions that can be taken, or continued, against the debtor and the debtor's property after it files for bankruptcy. It provides that the filing of a bankruptcy petition automatically stays: the commencement or continuation of judicial or administrative proceedings against the debtor that were or could have been commenced pre-petition, or which seek to recover on a claim that arose pre-petition, 11 U.S.C. 362(a)(1); the enforcement of a pre-petition debt or pre-petition judgment against the debtor, 11 U.S.C. 362(a)(2) and (6); "any act to obtain possession

2. On October 4, 1989, the bankruptcy court entered a permanent injunction prohibiting the pilots' union from prosecuting the Florida action. Pet. App. 102a-104a. It held that the Florida lawsuit violated the bankruptcy stay because the suit would obstruct the debtor's reorganization by "controlling the manner in which it uses its assets." See *id.* at 100a; see also 11 U.S.C. 363(a)(3).

3. The pilots' union appealed the bankruptcy court's ruling to the district court under 28 U.S.C. 158(a). It also appealed a second bankruptcy court order staying the arbitration of a union grievance. Pet. App. 30a-31a.

On April 9, 1990, the district court reversed both bankruptcy court orders. Pet. App. 60a-71a, 85a. First, the district court held that the stay of the arbitration proceeding was improper. Section 1113(f) prohibits using the bankruptcy stay provisions (or any other Code provision) "to unilaterally terminate or alter" a labor contract. A stay of the arbitration proceedings would have allowed Eastern to nullify the term of the collective bargaining agreement requiring the arbitration of grievances. The stay was therefore improper under Section 1113(f). Pet. App. 71a-74a.

Second, the district court held that the stay of the Florida wet-leasing suit was improper. It reasoned that Section 1113 rendered the automatic stay inap-

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of the property of the estate * * * or to exercise control over property of estate," 11 U.S.C. 362(a)(3); the creation, perfection, or enforcement of a lien, 11 U.S.C. 362(a)(4)-(5); setting-off a pre-petition debt against any claim against the debtor, 11 U.S.C. 362(a)(7); and the commencement or continuation of a proceeding in the Tax Court concerning the debtor, 11 U.S.C. 362(a)(8). Section 362(b) sets out a list of proceedings and actions that are exempt from the stay.

plicable to suits to enforce collective bargaining agreements. Pet. App. 66a-68a. It also held that a stay was not authorized by 11 U.S.C. 105(a), which empowers the bankruptcy court to "issue any order * * * that is necessary to carry out the provisions of this title." Since neither party had presented the issue of the legality of the wet-leasing practice to the bankruptcy court, that court did not need to enjoin the Florida action to protect its own jurisdiction. Pet. App. 81a-83a.

4. Eastern appealed the district court's ruling to the Second Circuit. Pet. App. 4a, 6a-7a. The court of appeals summarized the issue presented by the appeal:

> This appeal raises the question of the effect of § 1113 of the Bankruptcy Code on the application of the automatic stay provisions of § 362 of the Bankruptcy Code to non-bankruptcy proceedings to enforce a collective bargaining agreement. ***

Id. at 7a.

In the court of appeals' view, the purpose of Section 1113 is to ensure "that a collective bargaining agreement remain in effect and that the collective bargaining process continue after the filing of a bankruptcy petition unless and until the debtor complies with the provisions of § 1113." Pet. App. 9a-11a. The court held that Section 1113(f) should be construed "quite literally" to prohibit the application of other Code provisions only if such application would effect a unilateral modification or termination of a collective bargaining agreement. Pet. App. 11a-12a.

Under the court of appeals' approach, Section 1113 did not in all cases preclude application of the automatic stay provision to disputes over collective bar-

gaining agreements. Pet App. 12a. In support of that conclusion, the court noted that when Congress passed Section 1113, it added two exceptions to the automatic stay, but did not provide an exception for disputes arising out of collective bargaining agreements. Pet. App. 12a. The court concluded that a case-by-case approach is necessary to determine whether a particular application of the stay conflicts with Section 1113, *i.e.*, whether a stay would in effect modify or terminate a collective bargaining agreement.

The court of appeals affirmed the district court's order vacating the stay of the arbitration proceeding. Pet. App. 22a-23a. The court of appeals agreed with the district court that the stay of arbitration was improper because it effectively nullified the labor contract's clause requiring arbitration. *Id.* at 14a-15a.

At the same time, the court of appeals reversed the district court's order vacating the bankruptcy court's stay of the Florida wet-lease action. A stay of a lawsuit to enforce a collective bargaining agreement, the court of appeals said, does not necessarily conflict with Section 1113. If the bankruptcy court could not hear the dispute, it would have to lift the stay and allow the union to sue elsewhere. But if the bankruptcy court could hear the union's contract action, nothing in Section 1113 barred the bankruptcy court from staying the union's suit against the debtor in another court. Pet. App. 16a-18a.

In this case, the stay was proper because it did not modify or terminate the collective bargaining contract, but merely required the union to enforce the contract in the bankruptcy court. The court of appeals remarked that the wet-leasing dispute was within the bankruptcy court's core jurisdiction because its determination would affect the administra-

tion of the estate. Pet. App. 19a-20a. The court further remarked that the district court would not be required to withdraw the dispute from the bankruptcy court under 28 U.S.C. 157(d), because its adjudication required only a routine application of a non-bankruptcy federal statute. Pet. App. 20a-21a.[3] Since the bankruptcy court could stay the Florida wet-lease action consistent with Section 1113, the court remanded the case to the district court for further consideration of the wet-lease decision and whether the bankruptcy court was prohibited by the Norris-LaGuardia Act from enjoining the Florida action. Pet. App. 22a-23a.

Judge Miner dissented from the court's decision with respect to the wet-lease action. He said that since neither party brought the wet-lease dispute before the bankruptcy court, there was no need for a stay to protect the bankruptcy court's jurisdiction. Pet. App. 26a-27a.

DISCUSSION

Only the first of the three questions presented by the pilots' union is properly presented by the petition. That question is: To what extent does 11 U.S.C. 1113 (which governs modification and rejection of collective bargaining agreements) abridge 11 U.S.C.

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[3] 28 U.S.C. 157(d) provides:

> The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

362(a) (which automatically stays certain actions against the debtor and the debtor's property when a bankruptcy petition is filed). Since that question is one of first impression, there is no circuit conflict and therefore no need for this Court to intervene to ensure the uniformity of the law.

Nor is resolution of the question presented necessary for proper disposition of this case. The district court on remand might find that Section 362(a) does not even operate to stay the Florida wet-lease action, which would make the controversy over the application of Section 1113 moot. Alternatively, Eastern might remove or transfer the Florida action to New York using other provisions. There is no compelling need for this Court's review at this time.

1. The only issue squarely presented by the petition is the extent to which 11 U.S.C. 1113 limits the scope of the automatic stay provision, 11 U.S.C. 362(a). The pilots' union does not contend that there is a circuit conflict regarding Section 1113's relationship to Section 362. Pet. 12-20. Indeed, the Second Circuit is the first and only court of appeals to have addressed the issue.

a. In 1984, this Court ruled that a bankruptcy trustee can unilaterally terminate a collective bargaining agreement. See *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513 (1984). In so holding, the Court primarily relied on 11 U.S.C. 365(a), which generally furnishes the bankruptcy trustee with the option of whether or not to assume an executory contract. The Court held that a collective bargaining agreement is an executory contract under Section 365(a), and that the bankruptcy trustee can unilaterally terminate a collective bargaining agreement if he makes a reasonable effort to negotiate a voluntary modification and the bankruptcy court—taking into account the rele-

vant equities and hardships—finds that rejection of the agreement would facilitate a successful reorganization. See 465 U.S. at 521-527. The Court said that, under Section 362(g) of the Code, any claim arising from a trustee's rejection of an executory contract may be asserted only as a claim in bankruptcy. 465 U.S. at 530.

Congress reacted swiftly to the *Bildisco* decision. Five months after the decision was issued, Congress added Section 1113 to the Bankruptcy Code. See Pub. L. No. 98-353, § 541(a), 98 Stat. 390; see also Rosenberg, *Bankruptcy and the Collective Bargaining Agreement—A Brief Lesson in the Use of the Constitutional System of Checks and Balances*, 58 Am. Bankr. L.J. 293, 312-321 (1984) (examining the legislative history of Section 1113). Section 1113 permits a bankruptcy court to approve a trustee's proposal to reject a collective bargaining agreement only if certain procedures are followed and certain criteria are met. Among those criteria are that the trustee's proposal be "necessary" for the reorganization and that the "balance of the equities clearly favors rejection of [the] agreement." See 11 U.S.C. 1113(b)-(c). Section 1113 further provides that "[n]o provision of [the Bankruptcy Code] * * * shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section." See 11 U.S.C. 1113(f).

b. The parties' disagreement over the effect of Section 1113 is narrow. The parties agree that Section 1113 is the exclusive means for the trustee or debtor-in-possession to modify or terminate the debtor's obligations under a collective bargaining agreement. The parties also agree that the automatic stay provision of 11 U.S.C. 362(a) may not be applied "to

unilaterally terminate or alter" a collective bargaining agreement—Section 1113 is the exclusive means for achieving that end. See Pet. 12-14; Br. in Opp. 27-29. The only disagreement is whether a stay of an action to *enforce* a collective bargaining agreement "unilaterally terminate[s] or alter[s]" a collective bargaining agreement in violation of Section 1113(f). See Pet. 15-20.

The Second Circuit read Section 1113(f) literally: other Bankruptcy Code provisions cannot be construed to permit the trustee "to unilaterally terminate or alter" any provision of a collective bargaining agreement. Pet. App. 11a-12a. The court of appeals said that in deciding whether the bankruptcy court could enforce the automatic stay, it would examine, on a case-by-case basis, whether the stay would modify any provision of a labor contract. *Id.* at 12a-14a. Since staying the arbitration proceeding would allow the trustee to avoid the contract's arbitration clause, the court held that enforcing such a stay would violate Section 1113. Pet. App. 14a-16a. With regard to the wet-lease suit, however, the court of appeals said that the stay did not terminate or alter the contract. Although the stay forced the union to bring its suit to the bankruptcy court, it did not render the wet-lease provisions of the collective bargaining agreement unenforceable and thus did not terminate those provisions. Accordingly, the court held that the stay of the union's wet-lease suit was not barred by Section 1113. Pet. App. 16a-18a.

c. The pilots' union suggests that the Second Circuit erred in employing a case-by-case approach, and argues that the court of appeals should have adopted a *per se* rule instead. The correct rule, according to the union, is that Section 362 cannot be applied to labor contract disputes. See Pet. 15-20. The union's

proposal is not grounded in the text or history of Section 1113.

Section 1113 precludes the use of other Code provisions to permit a trustee "to unilaterally terminate or alter" any provision of a collective bargaining agreement. 11 U.S.C. 1113(f). As the Second Circuit explained, not every application of the automatic stay to a labor contract dispute will have that effect. If Congress had meant to exempt labor contract disputes from the automatic stay provision, it had the perfect opportunity to do so when it added Section 1113. In the same legislation that added Section 1113, Congress added several exemptions to the automatic stay for certain kinds of proceedings against the debtor. It did not, however, exempt labor contract disputes. Since the Second Circuit has addressed a question of first impression in the courts of appeals, and has given an answer that is not obviously incorrect, it would be premature for this Court to grant review.

2. An additional reason for denying the petition is that the proceedings on remand to the district court could moot the question of the effect of Section 1113 on Section 362(a).

a. There are open arguments that the Florida action is not subject to the automatic stay, quite apart from the effect of Section 1113. First, the automatic stay provision does not require all actions against the debtor (and the debtor's property) to be brought in the bankruptcy court. Since the union's action arose post-petition it is not stayed under Section 362(a)(1), and, unless it is otherwise stayed, it need not be brought before the bankruptcy court. See 28 U.S.C. 959, 1409(e) (post-petition claims arising from the administration of the estate may be brought to any state or federal court that could hear the dispute under nonbankruptcy venue provisions). Even if the

injunctive relief sought by the union could be stayed under Section 362(a)(3) as an act to exercise control over the debtor's property (but see *Penn Terra Ltd.* v. *Dep't of Environmental Resources*, 733 F.2d 267, 274-278 (3d Cir. 1984)), that aspect of the Florida action has now become moot since Eastern has terminated operations. The only live controversy still pending in Florida appears to be the union's damage claim for breach of contract. It is quite likely that the damage aspect of the union's claim would not be stayed by either Section 362(a)(1) or Section 362(a)(3). See *United States* v. *Inslaw*, 932 F.2d 1467, 1473 (D.C. Cir. 1991). If no Section 362(a) stay bars prosecution of the wet-lease action, then the effect of Section 1113 on the bankruptcy stay is irrelevant.

Second, the Second Circuit instructed the district court on remand to determine whether the anti-injunction provisions of Norris-LaGuardia Act, 29 U.S.C. 101, 104, 107-108, bar a stay of the Florida action. See Pet. App. 22a. That issue was one of the union's primary arguments on appeal. See Pet. C.A. Br. 32-40. If the pilots' union is correct that a stay would violate the Norris-LaGuardia Act, then the Section 1113 issue presented by this petition is again irrelevant to the proper disposition of this case.

b. There are other unaddressed provisions that may cause the transfer or removal of the wet-lease action from Florida to New York even if the backruptcy court may not enforce the automatic stay. Even if the pilots' union is correct that Section 1113 allows it to sue in the Southern District of Florida without violating the stay (or if the stay does not apply for other reasons), the trustee may still be able to force the union to litigate the matter in the backruptcy court. Under 28 U.S.C. 1452(a), the trustee can re-

move any claim or cause of action (subject to exceptions not applicable here) from any other court to the district court where the bankruptcy was filed—here the Southern District of New York—as long as the matter is within the latter district court's jurisdiction under 28 U.S.C. 1334. The wet-lease action is within the New York district court's Section 1334 jurisdiction since it is at minimum "related" to a case under Title 11. See 28 U.S.C. 1334(b). Thus, Eastern's trustee may, notwithstanding the issues presented by the petition, be able to remove the union's action to the Southern District of New York simply by filing a timely removal application with the bankruptcy court. See 28 U.S.C. 1452(a); Bankr. R. 9027(a)(1); 1 *Collier on Bankruptcy* ¶ 3.01[5][c], at 3-92 (15th rev. ed. 1991).

The action would then be automatically removed to the United States District Court for the Southern District of New York which then (by way of a standing order) would refer the matter to its adjunct, the bankruptcy court. See *In re Watson-Mahaney, Inc.*, 70 Bankr. 578 (Bankr. N.D. Ill. 1987) (removal is automatic); 28 U.S.C. 157(a) (referral authority).[4] And even if Section 1452 did not allow automatic removal of the Florida action to the bankruptcy court, the trustee could still attempt to transfer the Florida action to the Southern District of New York in the interest of justice or for the convenience of the parties. See 28 U.S.C. 1404, 1412.

Because this Court's intervention is not required to resolve a conflict among the circuits on the meaning of Section 1113, or to correct a clearly erroneous in-

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[4] If the case is removed to the bankruptcy court, the pilots' union could then seek a remand back to the Southern District of Florida. See 28 U.S.C. 1452(b).

terpretation of that Section necessary to the proper disposition of this case, the petition should be denied.

3. The pilots' union argues that this Court should grant review to address the hypothetical question whether the bankruptcy court could hear the labor contract action within its "core" jurisdiction. See 28 U.S.C. 157(b). That issue simply is not raised by this case in its present posture. The court of appeals held only that the bankruptcy court was not barred from staying the wet-lease dispute in the Florida district court. That holding did not require resolution of the question whether the bankruptcy court *could* hear the dispute itself as a core proceeding. If the union files its labor contract claim in the bankruptcy court, the nature of the bankruptcy court's jurisdiction can be properly litigated at that time.

The Second Circuit mistakenly believed that it was important to decide whether the wet-lease dispute was a core matter. Pet. App. 16a-22a. The court of appeals seemed to believe that if the wet-lease action was not within the bankruptcy court's core jurisdiction, a stay of the Florida action would violate Section 1113 since the trustee could ignore (and therefore effectively terminate) that aspect of the labor contract. Pet. App. 18a. But whether the labor contract dispute would be a core or non-core proceeding does not affect the union's power to litigate the matter in the bankruptcy court. The "core" or "non-core" designation affects only the scope of the district court's review of the bankruptcy court.[5] See

[5] In "core" proceedings, the bankruptcy judge may adjudicate and enter final orders subject to appellate style review by the district court—*i.e.*, *de novo* review on issues of law, clearly erroneous review on questions of fact. See 28 U.S.C. 157(b)(1), 158(a); Bankr. R. 8013. In "non-core" matters, absent consent of the parties, the bankruptcy judge may only

28 U.S.C. 157(b)-(c)(1). Even if the wet-lease suit were "non-core," the pilots' union would still be able to enforce its contractual rights in New York if the Florida action were stayed. In deciding the preclusive effect of Section 1113, it does not matter whether the proceeding would be core or non-core, or what role the bankruptcy court would have. Even if the Florida action were stayed, the pilots' union could vindicate its rights by filing an action in the bankruptcy court for the Southern District of New York.

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submit recommended findings to the district court, which then enters final judgment after reviewing *de novo* matters as to which a party has objected. 28 U.S.C. 157(c)(1).

The core/non-core distinction reflects Congress's decision, in restructuring the bankruptcy court system in 1984, to return bankruptcy judges to their pre-1978 role as "bankruptcy referees." See *In re Bertoli*, 812 F.2d 136, 139 (3d Cir. 1987); see also 130 Cong. Rec. 20,227 (1984) (Rep. Kastenmeier). Under the Bankruptcy Amendments and Federal Judgeships Act of 1984, bankruptcy judges have no jurisdiction of their own. The district court possesses original jurisdiction of all matters arising in and related to a bankruptcy case. See 28 U.S.C. 1334. The bankruptcy judges sit as "unit[s]" of the district court, only hearing matters referred to them by the Article III court. See 28 U.S.C. 151, 157(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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